Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1994

SHIRLEY M. RANDALL, M.D.

*Petitioner,*

v.

UNITED STATES OF AMERICA, et al.

*Respondent.*

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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December 20, 1994

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## QUESTION PRESENTED

Whether the military may disregard its validly prescribed procedural regulations promulgated to implement a congressional act which requires reporting on a nationwide basis of limitations on medical staff privileges of military physicians who have no recourse in law or equity while similarly situated civilian physicians may initiate claims for damages where they can establish that professional peer review actions taken against them did not comply with the fair hearing standards set out in Section 412 of the Health Care Quality Improvement Act of 1986.

**LIST OF PARTIES PURSUANT TO SUPREME COURT RULE 14.1(b)**

The United States of America

The United States Army

Donna Shalala

Michael P.W. Stone

Alcide M. LaNoue

Kevin C. Kiley

Elmer M. Casey

John T. Wilcox

William D. Strampnel

Unknown Unnamed Members of the United States Army

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 30 F.3d 518, and is reproduced as Appendix A.

The order of the district court dismissing Randall's complaint is not reported, and is reproduced as Appendix B.

The Journal Entry of Judgment of the District Court was entered on May 21, 1993, and is reproduced as Appendix C.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1994. Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc on August 5, 1994, which was denied on August 22, 1994. (App. D-1).

On November 9, 1994, Petitioner filed a timely request for an extension of time in which to file a Petition for Writ of *Certiorari*. By Order dated November 10, 1994, this Court granted Petitioner's request for an extension of time in which to file a petition up to and including December 20, 1994.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2101(c)

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Army Regulation 40-68 §4-9. Suspension, restriction, or revocation of Clinical Privileges, provides:

a. Action processes. ... Actions taken to withdraw clinical privileges will be taken promptly where there is reasonable cause to doubt the practitioner's competence to practice or for any other cause affecting patient safety. Reasonable cause includes:

(1) A single incident of gross negligence.

(2) A pattern of inappropriate prescribing.

(3) A pattern of substandard care.

(4) An act of incompetence or negligence causing death or serious bodily injury.

(5) Abuse of legal or illegal drugs or diagnosis of alcohol dependence. (See Chap. 7.)

(6) Practitioner disability (physical and psychiatric).

(7) Significant practitioner unprofessional conduct (k(5) below).

* * *

f. Hearing Committee Procedures

(1) The senior member of the hearing committee will be designated as the chairperson. The hearing is administrative in nature. Therefore, the rules of evidence prescribed for trials by courts martial or for court proceedings are not applicable. The committee must be fully informed of the facts so that it

may make an intelligent, reasonable, good faith judgment.
. . .

(2) The chairperson of the hearing committee will advise the practitioner in writing (fig. 4-3), delivered personally with a memorandum of acknowledgement (fig. 4-4), or by certified mail, return receipt requested, of the following:

(a) The specific concerns that led to the need for the hearing (including dates and pertinent documents where appropriate).

(b) . . .

(c) The names of the witnesses to be called to testify to the hearing committee.

(d) The right to be present, to present evidence, to question witnesses called, and to call witnesses in his or her behalf. . .. * * *

g. Action on Hearing Recommendations.

(1) After the record of the hearing has been prepared, the hearing committee will forward the record, including findings and recommendations, to the MTF commander).

The Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, §

412. STANDARDS FOR PROFESSIONAL REVIEW ACTIONS (42 U.S.C. 11112), provides:

> (a) **IN GENERAL.**-For purposes of the protection set forth in section 411(a), a professional review action must be taken--
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 411(a) unless the presumption is rebutted by a preponderance of tne evidence.
>
> (b) **ADEQUATE NOTICE AND HEARING.**-A health care entity is

deemed to have met the adequate notice and hearing requirement of subsection (a)(3) with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) **NOTICE OF PROPOSED ACTION.**-The physician has been given notice stating-

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(c) a summary of the rights in the hearing under paragraph (3).

* * *

(C) in the hearing the physician involved has the right-- (i) to representation by an attorney or other person of the physician's choice.

* * *

(D) upon completion of the hearing, the physician involved has the right--

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of

the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

§. 422. REPORTING OF SANCTIONS TAKEN BY BOARDS OF MEDICAL EXAMINERS

(a) **IN GENERAL**

(1) ACTIONS SUBJECT TO REPORTING.-Each Board of Medical EXAMINERS-

(A) which revokes or suspends (or otherwise restricts) a physician's license or censures, reprimands, or places on probation a physician, for reasons relating to the physician's professional competence or professional conduct, or

(B) to which a physician's license is surrendered, shall report, in accordance with section 424, the information described in paragraph (2).

(2) INFORMATION TO BE REPORTED.- The information to be reported under paragraph (1) is-

(A) the name of the physician involved,

(B) a description of the acts or omissions or other reasons (if known) for the revocation, suspension, or

surrender of license, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

**STATEMENT OF THE CASE**

From July 9, 1984 to August 22, 1991, petitioner Shirley M. Randall, M.D. was a member of the United States Army Medical Corps (M.C.). During that time, the United States Army's Credentials Committee limited Dr. Randall's practice of anesthesiology without first assuring that she had been afforded procedural and substantive due process of law mandated by the Constitution of the United States or by Army Regulations 40-68 promulgated to implement the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152.[1] [2]

[1]Because Randall's complaint was dismised for failure to state a claim, the facts recited herein are drawn from

Dr. Randall received her medical degree from the University of Virginia in 1981, and was licensed by the State of Virginia to practice medicine on August 16, 1982. Complaint for Equitable and Monetary Relief at 5, ¶13 (App.E 8-9) After graduating from Medical School and completing an internship, Dr. Randall undertook a two-year residency to specialize in anesthesiology (App.E-9, ¶15). On July 9, 1984, Dr. Randall entered the service of the United States Army (App.E.9, ¶14).

From August 2, 1984 through June

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the complaint, and must be taken as true for the purposes of this petition, *See Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Northwest Airlines, Inc. v. Transportation Workers Union of Am.* 51 U.S. 77, 80 n.3 (1981).

[2]*See 1988 The Army Lawyer 55-60 (Oct. 1988), "The Army's Implementation of the Health Care Quality Improvement Act of 1986,"* by Major Philip H. Lynch, Chief, Medical Malpractice Branch.

1987, Dr. Randall was assigned to the Army's Hospital in Heidelberg, Germany, where she was chief of the Anesthesiology and Operating Room Services (App.E-9, ¶16). Dr. Randall's Performance Evaluations while she was stationed in Heidelberg were uniformly high. Dr. Karl D. Bzik, chief of the Department of Surgery at Heidelberg, who evaluated Dr. Randall from August 2, 1984, through December 2, 1984, rated her as qualified to serve as the chief of Anesthesia and Operating Room Service and stated: "In a short period of time, [Dr.] Randall has demonstrated exceptionally outstanding performance of duty." (App.E 9-10, ¶ 17).

In Dr. Randall's 1985 annual evaluation, Dr. Bzik called her "superior." Dr. Bzik noted in the comments to his rating that Dr. Randall is "superbly trained and has consistently

demonstrated the highest degree of professionalism . . . She is an able diagnostician and is able to rapidly assess the situation during anesthesia resulting in outstanding care to her patients . . ." (App.E-10, ¶ 18).

Similarly, in Dr. Randall's 1986 annual evaluation, Dr. Bzik said "her performance continues to be outstanding . Her conduction of anesthesia is outstanding and safe for patients and the surgical team. Her results are excellent. She is very dependable and in crises, she can be relied upon and function on her own. . . She is also an outstanding proponent for Quality Assurance in her field." (App.E-10, ¶ 19). During the entire time Dr. Randall was at the Army's Heidelberg medical facility her Performance Assessment received the highest rating of "excellent" in 13 of 17

listed categories and "good"--the next highest rating--in the remaining four (4) categories. (App.E-12, ¶ 21).

On or about July 1, 1987, Dr. Randall entered into an assignment at the Army's Bayne Jones Community Hospital at Fort Polk, Louisiana, where she was Chief of Anesthesia and Operating Room Services (App.E-13, ¶ 22). Dr. Randall remained at the Bayne Jones Community Hospital in Fort Polk, Louisiana for two (2) years where she received the highest rating of excellent in the three clinical performance categories for both rating periods (App.E-14, ¶ 25). Dr. Joseph M. Smith, Chief of the Department of Surgery and Dr. Randall's immediate supervisor for the period 1988-1989, informed the Army in a letter dated January 3, 1991 that Dr. Randall's professional performance was flawless, in that [he] [could] not recall

a single anesthesia mishap." (App.E-14-15, ¶ 26).

Following a short tour of duty at Fort Sam Houston, Texas, where she had been assigned immediately after her tour of duty at Fort Polk, Louisiana, Dr. Randall was assigned to the Womack Army Hospital in Fort Bragg, North Carolina. Pursuant to Army Regulation 40-68 (hereinafter, AR 40-68), Dr, Randall received provisional[3] privileges to

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[3]Provisional or conditional clinical privileges are given to practitioners newly assigned to a facility or discipline; for example, when they first come on active duty or become employed by the AMEDD [medical facility], change duty stations, or complete a Graduate Health Professions Education (GHPE) program in a different specialty area. Practitioners who return to clinical practice after serving in a nonclinical capacity (for example, in an administrative or leadership role) for more 1 year will be given only provisional privileges, regardless of the reason for the nonclinical service, to permit an evaluation of their current clinical competence. AR 40-68, Chap. 4. Credentials Review, Privileging,

practice anesthesiology, also known as conditional privileges in AR 40-68.

Prior to Dr. Randall's arrival at Womack and without notice to her, Colonel Brian Condon (Anesthesiology Consultant to the Surgeon General for the Department of the Army) telephoned the Assistant Chief of the Anesthesia/Operative Service at Womack and informed him that Dr. Randall was being assigned to Womack to be retrained because of a decline in clinical abilities. (App.F-1)

Upon review of Dr. Randall's Officer Efficiency Reports (OER's) and credential files, the Assistant Chief of the Anesthesia/Operative Service learned that nothing in Dr. Randall's OER's and credentials file indicated that she needed

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and Proceedings,4-2. Clinical Privileges, 4(2)(d)(4).

to be retrained or reflected a decline in her clinical abilities to warrant being placed in a retraining status. He asked,

> in this case, how can I grant her anything less than full provisional privileges? This would mean that she would be treated as a staff anesthesiologist without restriction. I ask for a definition of Dr. Randall's clinical abilities and instructions on how she should be retrained upon her arrival. I must have this written direction since the command has found nothing in her files to even question her abilities and will grant full privileges without your direction. (App.F-2)

Dr. Condon responded:

> Dr. Randall satisfied the minimal requirements for residency training five years ago. She has been assigned where we should expect her to develop professionally with considerable difficulty, e.g. small hospital; no role model or peer group stimulation. * * * "It is my opinion that this is sufficient evidence to create enough doubt about the clinical competence of this physician, in the specialty of Anesthesiology, to recommend a careful clinical evaluation * * * to decide whether full credentials should be applied (App. G-1).
>
> Provisional privileges are granted

for a period of 365 days. AR 40-68, Chap. 4, 4-2(4)(a). After serving approximately eleven (11) months at Womack, a hearing was held concerning Dr. Randall's privileges. (App.H) Following this hearing, on or about January 22, 1991, Dr. Randall was continued on provisional privileges (App. E-16, ¶ 28).

All of Dr. Randall's written evaluations and assessments received after January 22, 1991, were satisfactory and led her to believe that she was considered to be performing "competently." (App. E-17, ¶ 30) Two evaluations of privileges and performance assessments for Dr. Randall at WOMACK were done by Colonel Lynn George for the periods May 16, 1990 through February 15, 1991 and February 16, 1991 through June 15, 1991. Nothing was found to be unsatisfactory about Dr. Randall's clinical knowledge and ability.

(App.E-17, ¶ 31)

By memorandum dated July 30, 1991, from the newly appointed Chairman of the Credentials Committee, Colonel Kiley, Dr. Randall learned after-the-fact that the Credentials Committee had met on July 11, 1991 and recommended a limitation on her practice of anesthesiology. This result was an adverse professional action against the Appellant. Even with the recommended restrictions, the memorandum dated July 30, 1991, sets forth certain anesthetizations[4] that Dr. Randall was permitted to

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[4]Delineation of Limited Privileges: Dr. Shirley Randall

1. ASA Class 1 and 2 patients may be anesthetized by Dr. Randall without supervision or consultation. Any complication or abnormality which occurs during the case must be reported to the Anesthesiologist on call.

2. ASA Class 3-5 will be presented to the responsible Anesthesiologist. There will be no exceptions. The responsibility of identifying the need to present the patient will be Dr. Randall's. Phone consultation of these

perform unsupervised (App.E-18-19, ¶ 33).

The memorandum dated July 30, 1991, was Dr. Randall's first notice that the credentials committee hearing about her which recommended limitation of her clinical privileges to practice anesthesiology based upon incompetence, unprofessional conduct or similar factors was executed under Army Regulation 40-68. (App.E-19-20, ¶ 34).

However, in neither the memoranda of July 30th nor in any other communication,

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cases will occur during her duty hours on emergent cases. Patient will be presented before COB for the day prior to surgery on scheduled procedures.

* * *

5. No Pediatric case below the age of six will be performed without supervision.

6. No central line placement will occur without supervision.

7. Any complication or post operative difficulties will be reported to the Anesthesiologist on call.

8. Dr. Randall will not be responsible for supervision of anesthetists.

was Dr. Randall advised either before or after the credentials committee hearing as to the specific charges against her, the specific findings against her under AR 40-68, and the specific factual reasons, if any, for the limitations on her clinical privileges (App.E-20, ¶ 35).

Not knowing of the date of the hearing, [Dr. Randall] had no opportunity to attend same, no opportunity to confront witnesses, if any, against her, and no opportunity to rebut witnesses against her with testimony of her own or other witnesses or documents. By being denied notice of the date, time, and nature of the hearing, Dr. Randall was also denied the right to effective representation by counsel at the hearing (App.E-20-21, ¶ 35).

Dr. Randall appealed the actions taken against her by the Credentials

Committee in its meeting of July 11, 1991. Subsequently, by Memoranda dated August 1, 1991, Dr. Randall received a Notice of Hearing signed by the Chairman of the Credentials Committee, in which he declared that the Credentials Committee will conduct a hearing on August 13, 1991, "concerning allegations that may adversely affect your clinical privileges." As with the Memoranda of July 30, 1991, Dr. Randall was not informed of the charges against her, but was informed that "[r]ecords concerning these [unspecified] allegations are available to you at the Quality Assurance Office." Dr. Randall was further informed that "you may not be represented by counsel." Dr. Randall personally went to the Quality Assurance Office and requested the records referred to in said Notice of Hearing, but was neither shown nor provided copies of any

records referred to in said Notice of Hearing (App.E-21, ¶ 36).

Subsequently, Dr. Randall received a second memorandum dated September 12, 1991 signed by the Chairman of the Credentials Committee informing her that her hearing had been rescheduled for September 27, 1991. This memorandum, like the July 30th memorandum, also failed to state the specific charges against Dr. Randall, the specific finding against her under AR 40-68, and the specific factual reasons, if any, for the limitations on her clinical privileges. The Special Credentials Hearing Committee meeting referenced in the August 1st and September 12th memoranda was held on September 27, 1991. Having already resigned from the Army because of the intolerable conditions to which she had been continuously subjected, Dr. Randall submitted a written response

to the conclusory allegation of the chairman of the Credentials Committee. (App.E-22, § 38).

At the September 27, 1991, meeting, the "Special Credentials Committee" again recommended limiting Dr. Randall's clinical privileges. Colonel Casey, by memorandum dated October 7, 1991, approved the limitations placed on Dr. Randall's clinical privileges even beyond the recommendation of the "summary limitation." (App.E-23, ¶ 39).

Following the summary limitation of Dr. Randall's clinical privileges, agents for the United States Army prepared and submitted an Adverse Action Report to the National Practitioner Data Bank which labeled Dr. Randall as professionally "incompetent." (App.E-23, ¶ 40)

The Adverse Action Report submitted by the United States Army to the National

Practitioner Data Bank caused grievous and irreparable injuries to Dr. Randall. The National Practitioner Data Bank is the central clearing house created by the Secretary, United States Department of Health and Human Services (HHS), pursuant to 42 U.S.C. § 11101, where credentials, qualifications, and competency of physicians must be checked by hospitals, insurers and other health care entities prior to employing a physician. (App.E-24, ¶ 41)

Dr. Randall was officially notified of the limitation placed on her clinical privileges by memorandum of October 7, 1991, from Colonel Elmer Casey, Hospital Commander. Pursuant to Colonel Casey's memorandum, Dr. Randall appealed the limitations on her clinical privileges to the Commander, Army Health Services Command. Dr. Randall was subsequently

notified by the Command that it would not entertain her appeal because she had failed to exhaust her administrative remedies. (App.E-24-25, ¶ 42).

On or about June 22, 1992, Dr. Randall was informed by Notice from the National Practitioner Data Bank that the United States Army had submitted to it an Adverse Action Report on her practice (App.E-25, ¶ 43). Following receipt of the Notice of Adverse Action Report, on June 30, 1992, Dr. Randall notified the National Practitioner Data Bank that she desired to dispute the Report. Additionally, Dr. Randall requested a hearing by the Secretary, HHS, in the event the Defendant refused to withdraw the report. (App.E-26, ¶ 45).

Moreover, Dr. Randall's counsel advised the United States Army that she had filed a dispute concerning the Adverse

Action Report it had submitted to the National Practitioner Data Bank and requested the Army to resolve the dispute over its Adverse Action Report (App.E-26-27, ¶ 46). By letter dated July 14, 1992 through Colonel Strampel, Chief, Quality Assurance Division, Office of the Surgeon General, United States Army, to Dr. Randall's counsel, she was advised that it would not reopen her case (App.E-27, ¶ 47).

Finally, on or about July 20, 1992, Dr. Randall received a Dispute Acknowledgement from the National Practitioner Data Bank dated July 15, 1992, advising that the Secretary, HHS, "will not review the appropriateness of a health care entities [sic] professional review action" (App.E-27-28, ¶ 48).

Having exhausted her administrative remedies, Dr. Randall filed suit in the

United States District Court for the Eastern District of North Carolina alleging among other claims the violation by the Defendants of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States not to be deprived of liberty or property without basis in fact for the publication to the National Practitioner Data Bank proclaiming her "incompetence" or without basis in fact underlying the restriction of clinical privileges reported to the National Practitioner Data Bank (App.E-28-29, ¶ 50); and violation of her due process right "not to be deprived of liberty or property absent a fair procedure." In addition to the United States of America, she named the following as defendants: Louis W. Sullivan,[5]

[5]Replaced by Donna Shalala as a defendant.

Secretary, HHS; Michael P. W. Stone, Secretary of the Army; General Alcide M. Lanoue, Surgeon General of the Army; Colonel Kevin C. Kiley, Deputy Commander for Clinical Services and Chairman of the Credentials Committee for Womack Army Community Hospital; Colonel John T. Wilcox; Lt. Colonel William D. Strampnel, Chief of the Quality Assurance Division of the Army; and other Unknown and Unnamed Members of the U.S. Army

Dr. Randall also sought declaratory and injunctive relief to enjoin publication of the Adverse Action report of the limitations placed on her practice of anesthesiology for "incompetence" to the National Practioner Data Bank issued in violation of her procedural and substantive due process rights under the Fifth Amendment to the Constitution of the United States and in violation of AR 40-

68, regulations promulgated by the Army to implement the Health Care Quality Improvement Act, 42 U.S.C. §11133 (a)(3)(B). On May 20, 1993, the district court dismissed Dr. Randall's complaint in its entirety. In granting the defendant's motion to dismiss for failure to state a claim upon which relief could be granted, the court held that Dr. Randall failed to establish a violation of a constitutional right; that the Army gave Dr. Randall all the process that she was due; that the individual defendants were entitled to qualified immunity, and that Dr. Randall's claims against them were also barred by statute.

On July 26, 1994, the United States Court of Appeals for the Fourth Circuit, which had jurisdiction pursuant to 28 U.S.C. §§ 1291, 2201 and 2202, affirmed the district court's judgment. The Court

held that *Siegert v. Gilley*, 500 U.S. 226 (1991), and *Paul v. Davis*, 424 U.S. 693 (1976), were controlling stating that action which inflicts a stigma on the reputation of a plaintiff causing that plaintiff hardship in obtaining employment is harm to reputation that does not rise to the level of a constitutional deprivation.

On August 5, 1994, Dr. Randall filed a timely petition for rehearing and suggestion for rehearing en banc. The court denied the petition for rehearing and rejected the suggestion of rehearing en banc without opinion on August 22, 1994. (App.D-1).

Unlike Dr. Randall, a civilian physician who could establish that he or she had not received a list of the reasons for peer review action adversely affecting their clinical privileges may bring a

lawsuit for damages to their reputations and medical practices. *See, for example, Summit Health, Ltd. v. Pinhas*, 500 U.S. at 322 n.12 (1991).

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT REGULATIONS VALIDLY PRESCRIBED BY A GOVERNMENT ADMINISTRATOR ARE BINDING UPON HIM AS WELL AS THE CITIZEN, AND THAT THIS PRINCIPLE HOLDS EVEN WHEN THE ADMINISTRATIVE ACTION UNDER REVIEW IS DISCRETIONARY IN NATURE.

This Court has held in a long line of cases that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 U.S. 363 (1957) (quoting *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)); see *Vitarelli v. Seaton*, 359 U.S. 535, 540

(1959) (scrupulous observance of departmental procedural safeguards is clearly of particular importance).

The Fourth Circuit's decision violates this cardinal principle. The plain language of the Department of the Army's Regulation 40-68, §4-9 Suspension, restriction, or revocation of Clinical Privileges, (f)(2) Hearing Committee Procedures, states, in pertinent part:

> The chairperson of the hearing committee will advise the practitioner <u>in writing</u> (fig. 4-3)(emphasis supplied), delivered personally with a memorandum of acknowledgement (fig. 4-4), or by certified mail, return receipt requested, of the following: (a) The specific concerns that led to the need for the hearing (including dates and pertinent documents where appropriate).

Army Regulation 40-68 implements the Health Care Quality Improvement Act of 1986 (hereinafter HCQIA) 42 U.S.C. §§ 11101-11152. *See The Army Lawyer*, 55-60

(Oct. 1988), *"The Army's Implementation of the Health Care Quality Improvement Act of 1986," supra.* Section 411 of the HCQIA grants immunity to peer review participants who, *inter alia*, observe the standards for professional review actions set out in Section 412 of the HCQIA. Section 412(b)(1)(A)(i) states that the adequate notice and hearing requirements ... are deemed to have been met if the physician has been, *inter alia*, given notice of the reasons for the proposed action. Thus, both AR 40-68 and the statute which it implements mandates that the practitioner be informed *in writing* of the specific charges against [him or her].

The Fourth Circuit's rationale that "written notice is not required where past events or discussion have provided a physician with notice of the adverse charges" despite the existence of validly

prescribed regulations to the contrary flies in the face of this court's long established precedent that *"regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature."* *Cf. Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Christilf v. Annapolis Hospital*, 496 F.2d 180 (4th Cir. 1974).

The argument that *Siegert v. Gilley*, 500 U.S. 226, and *Paul v. Davis*, 424 U.S. 693, are controlling completely disregards the fact that the credentialling actions taken with respect to the limitations placed on Dr. Randall's practice of anesthesiology were taken pursuant to Army Regulation 40-68 which requires the chairperson of the hearing committee to notify her in writing of the specific

concerns that led to the need for the hearing including dates and pertinent documents. Thus, the first level of inquiry is whether the actions taken were in conformance with the regulations. In this case, each of the notices of hearing that were sent to Dr. Randall were identical in that each stated: *"the allegation to be reviewed alleges an inability to practice as an independent anesthesiologist."* (App. J and App. K) Clearly, no specific concerns are apparent from the foregoing statement which is, in effect, no more than a conclusion stated with no basis in fact. The specific concerns that led to that conclusion are what AR 40-68 requires the chairperson of the hearing committee to convey to the military practitioner in writing prior to the hearing. Plain and simply, the Army failed to comply with the provision of its

regulation (AR 40-68) which requires it to advise the practitioner in writing of the specific concerns that led to the need for the hearing.

## II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS WHICH THE FOURTH CIRCUIT'S DECISION CREATES AS TO WHETHER A GOVERNMENT ADMINISTRATOR IS OBLIGATED TO OBSERVE ITS OWN VALIDLY PRESCRIBED PROCEDURAL REGULATIONS

Finally, the Fourth Circuit's decision is inconsistent with the well established body of law which requires a government administrator to scrupulously observe its own validly prescribed procedural regulations. *Accardi v. Shaughnessy,* 347 U.S. 260; *Service v. Dulles,* 354 U.S. 363; and *Vitarelli v. Seaton,* 359 U.S. 535.

In addition to conflicting with this Court's decisions, the Fourth Circuit's decision is inconsistent with its own Fourth Circuit law and creates a conflict

among the circuits where none previously existed. *See*, for example, *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970), a case involving a suit by an army officer against the Secretary of Defense and the Army, the Court, without requiring the Plaintiff to exhaust administrative remedies, held that failure of the Army to follow its own regulations, whether or not constitutionally mandated, entitled the Plaintiff to an injunction until the regulations were followed. The Court reasoned as follows:

> We are fully mindful of the restricted role of the judiciary with respect to the internal affairs of the Army. . .
>
> * * *
>
> On the other hand, neither this Court, nor others to which a similar issue has been presented, has evidenced, hesitation in directing the military to comply with its own regulations where it has been shown that a regulation was not

> followed, and there has been a prima facie showing that a member of the military has been prejudiced thereby . . . The problem is only one aspect of the broader rule that when the sovereign has established rules to govern its own conduct it will be held to the self-imposed limitations on its own authority, departure from which denies procedural due process of law.

435 F.2d at 1070-71.

This principle, firmly established in *Accardi v. Shaughnessy*, 347 U.S. 260, and *Service v. Dulles*, 354 U.S. 363, has been consistently followed by the courts in each of the circuits.[6] If the Fourth

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[6] *Service v. Dulles*, 354 U.S. at 363 (1957) has been consistently followed by each of the circuits. *See Distrigas of Massachusetts Corp. v. F.E.R.C.*, 737 F.2d 1208 (1st Cir. 1984); *De Rosa v. U. S. Department of Housing & Urban Development*, 787 F.2d 840 (2nd Cir. 1986); *Lojeski v. Boaudl*, 788 F.2d 196 (3rd Cir. 1986); *U.S. v. Heffner*, 420 F.2d 809 (4th Cir. 1970); *Woodward v. Los Fresnos Md. School District*, 732 F.2d 1243 (5th Cir. 1984); *Nationwide BLDG Maintenance, Inc. v. Reich*, 14 F.3rd 1102 (6th Cir. 1994); *Shidaker v. Carlin*, 782

Circuit's decision in this case is not reversed, a conflict will exist among the circuits.

## III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ISSUE OF WHETHER GOVERNMENT ADMINISTRATORS MUST ABIDE BY THEIR OWN VALIDLY PRESCRIBED PROCEDURAL REGULATIONS BEFORE THEY MAY CONDUCT A PEER REVIEW PROCEEDING TO LIMIT A MILITARY PRACTITIONERS MEDICAL PRIVILEGES AND REPORT THE PRACTITIONER TO THE NATIONAL PRACTITIONER DATA BANK IS AN IMPORTANT FEDERAL QUESTION

In 1986, Congress passed Public Law 99-660 known as the Health Care Quality Improvement Act of 1986, 100 Stat. 3784, 42 U.S.C. §§ 11101-11152 (1986)

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F.2d 746 (7th Cir. 1986), *Voyageurs Region Nat. Park Ass'n v. Lujan*, 986 F.2d 424 (8th Cir. 1992), *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990); *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634 (10th Cir. 1990); *Painter v. F.B.I.* , 537 F.S. 232 (11th Cir. 1982) (The 11th Circuit was established in 1980.); *Sargisson v. U.S. (Sec. Air Force)* 913 F.2d 918 (Fed. Cir. 1990).

(hereinafter the HCQIA). The HCQIA addresses the problem of incompetent physicians by encouraging objective peer review and providing an information system which prevents incompetent physicians, military or civilian, from relocating to other jurisdictions without detection. Part B of the HCQIA - Reporting of Information, § 11131, requires, *inter alia*, that: 1) medical malpractice payments; 2) revocations or suspensions of medical licenses; and 3) adverse actions which affect a physician's clinical privileges for a period of longer than 30 days, be reported to the Secretary, Department of Health and Human Services (HHS) or his designee. Section 425, Duty of Hospitals To Obtain Information, 42 U.S.C. 11135, requires hospitals to request from the Secretary, HHS, or his designated agency, information reported

which adversely affects a physician.

A Memorandum of Understanding was executed between the Secretaries of the Department of Health and Human Services and the Department of Defense requiring the Army to participate in the reporting requirements of the HCQIA. 42 U.S.C. § 11152(b) Pursuant to the HCQIA, the Army promulgated Army Regulation 40-68. *See 1988 The Army Lawyer 55-60 (Oct. 1988), "The Army's Implementation of the Health Care Quality Improvement Act of 1986,"* by Major Philip H. Lynch, Chief, Medical Malpractice Branch. This case presents the important Federal question, which has not been but should be decided by this Court, whether the military may disregard its validly prescribed procedural regulations promulgated to implement a congressional act which requires reporting on a nationwide basis of limitations on medical

staff privilege of military physicians who have no recourse in law or equity while similarly situated civilian physicians may initiate claims for damages where they can establish that professional peer review actions taken against them did not comply with the fair hearing standards set out in Section 412 of the HCQIA.

Section 412, 42 U.S.C. § 11112, sets out the standards under which civilian physicians who participate in objective peer review activities are entitled to conditional or qualified immunity from liability of damages under Federal and state laws. H.R. Rep. #903, 99th Congress, 2d Session, at page 6. For immunity from suit, the following elements must be satisfied as set forth in 42 U.S.C. 11112, to wit: A professional review action must be taken:

(1) in the reasonable belief that

> the action was taken in furtherance of quality health care;
>
> (2) after a reasonable effort to obtain the fact of the matter
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and
>
> (4) in the reasonable belief that the action was warranted by the facts proven after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).

Failure to observe the § 412 Fair Hearing Standards subjects peer review participants to liability in damages. *See, Summit Health, Ltd. v. Pinhas*, 500 U.S. at 322 n.12.

The Fourth Circuit's decision in this case subjects military physicians to a double standard since under *Mickens v. United States*, 760 F.2d 539, 540 (4th Cir. 1985), cert. denied, 474 U.S. 1104 (1986), the Fourth Circuit held that superior

officers are immune from suit brought by subordinate officers which expanded this Court's holding in *Chappell v. Wallace*, 462 U.S. 296 (1983) (holding that "due to special factors that define military life ... enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations").

The Fourth Circuit's decision will allow the military to operate in an arbitrary and capricious fashion since they are always free to observe the regulations set down in AR 40-68, but, under the ruling in the instant case, may disregard them at will.

Not only does the Fourth Circuit's decision countenance the Army's failure to abide by AR 40-68 which, if followed, would afford minimum due process for military physicians, it also thwart's the

[Congress'] intent that physicians receive fair and unbiased review to protect their reputations and medical practices. See H. R. Report #903, 99th Congress, 2nd Session, at page 11.

This issue should be decided by this Court since the body of law which requires a government administrator to abide by its own validly prescribed procedural regulations would be absolutely meaningless if the Fourth Circuit's decision is allowed to stand.

## CONCLUSION

For the reasons stated, Petitioner Dr. Shirley Randall requests this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

GREEN & FOUSHEE

By: Iris McCollum Green

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December 20, 1994

**CERTIFICATE OF SERVICE**

I, hereby, state that on this 20th day of December, 1994, that a copy of the foregoing Petition for Writ of Certiorari was mailed, first-class, postage prepaid to the following:

Mr. Drew S. Days, III
Solicitor General
U. S. Department of Justice
Washington, D. C. 20530

Iris McCollum Green

# APPENDIX A

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## JULY 26, 1994

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

| | |
|---|---|
| Shirley M. Randall, M.D., Plaintiff-Appellant, | |
| v. | |
| United States Of America; United States Department of The Army; Donna E. Shalala, Secretary of Health and Human Services; Michael P. W. Stone, Secretary of the Army Alcide M. Lanoue, General, Surgeon General of the Army; Kevin C. Kiley, Colonel, individually and in his official capacity as Deputy Commander for Clinical Service and Chairman of the Credentials Committee for Womack Army Community Hospital; Elmer M. Casey, Colonel, individually and in his official capacity as Commander of Womack Army Community Hospital; John T. Wilcox, Lieutenant Colonel, in his official capacity; William D. Strampel, Lieutenant Colonel, Chief of the Quality Assurance Division of the Army, Unknown Named Members of the US Army, | No. 93-1742 |
| *Defendants-Appellees.* | |

**Appeal from the United States District for the Eastern District of North Carolina at Fayetteville.**
**W. Earl Britt, District Judge.**
**(CA-92-96-3BR)**

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Argued: May 12, 1994

Decided: July 26, 1994

Before CHAPMAN, Senior Circuit Judge, ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation, and KNAPP, Senior United States District Judge for the Southern District of West Virginia, sitting by designation.

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Affirmed by published Opinion. Senior Judge Chapman wrote the opinion, in which Judge Ellis and Senior Judge Knapp joined.

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**COUNSEL**

**ARGUED:** Iris McCollum Green, GREEN & FOUSHEE, Washington, D. C., for Appellant. Peter Rolf Maier, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Frank W. Hunger, Assistant Attorney General, Douglas J. McCullough, United States Attorney, Barbara L. Herwig, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

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**OPINION**

CHAPMAN, Senior Circuit Judge:

Shirley M. Randall, M.D., a former United States Army physician, brought this action against the United States and two of her former supervisors for alleged violations of her constitutional rights associated with limitations placed on her practice while she was an anesthesiologist at the Womack Army Community Hospital ("Womack") at Fort Bragg, North Carolina. The defendants moved for dismissal under Rule 12(b)(6), arguing that Randall had failed to establish that the Government had violated her constitutional rights and that the individual defendants were qualifiedly immune from suit. The district court granted the Government's motion to dismiss and we affirm.

I.

Dr. Randall entered the United States Army in June 1984, shortly after her graduation from medical school at the

University of Virginia. During her tenure with the Army, Randall was stationed in Heidelberg, Germany, Fort Polk, Louisiana, and Fort Sam Houston, Texas. Randall's supervisors completed numerous evaluations of her work, some good and some bad. The good evaluations stated that Randall's performance was "excellent." "outstanding" and "superior." The bad ones expressed concern over her ability to take direction, to function without supervision, and to react to crisis situations.

Randall arrived at Womack on January 10, 1990. She was given provisional privileges to practice anesthesiology with qualified supervision for a period of 365 days.[1] Army regulations provide that the "[f]ailure to attain and retain

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[1]Because Randall was transferred from another duty station, Army practice is to extend provisional privileges for one year. Army Regulation 40-68, 4-2(a)(4).

required proficiency levels for defined privileges by the end of the provisional period will require an evaluation as to whether revocation or permanent restriction of privileges is appropriate." Army Regulation ("AR") 40-68 4-2(a)(4)(b). The Army may restrict a doctor's privileges based upon reasonable cause to doubt his or her competence to practice or for any other cause affecting patient safety. AR 40-68, 4-9(a). Reasonable cause includes a single act of gross negligence or a pattern of substandard care. AR 40-68, 4-9 (a)(1), (3).

Over the course of 1990, Randall demonstrated numerous instances of poor judgment, including leaving a patient during the course of a medical procedure when the patient's anesthesia was wearing off, and failing to have a patient's blood typed or to call for additional blood as

the patient was losing blood during the course of a procedure. On December 9, 1990, Randall received notice that the Womack credentials committee would conduct a hearing concerning allegations that she was not qualified to practice as an independent anesthesiologist. On January 8, 1991, the credentials committee met to evaluate Dr. Randall's performance while at Womack and to consider an adverse privileging action against her. Dr. Randall and her attorney were present at the hearing, where she called and questioned witnesses, and presented evidence to rebut the allegations of substandard care and deficient knowledge. The credentials committee elected to continue Randall's provisional privileges with supervision for a period of five months and gave her notice of the decision on January 22, 1991.

At the end of the five month period, the credentials committee decided to extend Randall's provisional practice for another month, but notified Randall that they would meet again sometime after June 21, 1991 to evaluate her status.[2] On June 25, 1991, Major Michael Kidd, M.D., former Chief of Anesthesiology at Womack, recommended that Randall receive full clinical privileges, but he expressed some concern over his recommendation because of his lack of opportunity to observe Randall during complex cases. Despite this endorsement, the committee met again on July 11, 1991 and decided to limit Randall's practice due to her "inability to practice as an independent anesthesiologist." The committee recommended that Randall be

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[2]Randall tendered her resignation on May 1, 1991, which did not become effective until August 22, 1991.

limited to practicing simple anesthetics without supervision and restricted her ability to performer more complex cases. Once approved by Commander, this action would be considered adverse and therefor reportable to the National Practioner Data Bank. Randall did not receive notice prior to the meeting, but did receive notice of the recommendation and was informed that she could challenge the recommendation at a hearing. She requested a hearing which was set for August 13, 1991. The notice stated in part:

> The credentials committee will hold the hearing on August 13, 1991 at 0830 hours...You have the right to be present, to present evidence and call witnesses in your behalf, to cross-examine witnesses called by the committee, to consult legal counsel....Failure to appear at the hearing will constitute a waiver of both the rights listed here and the right to appeal.

Randall acknowledged receipt of the notice

and informed the committee that she would attend the hearing along with her attorney. Randall requested an extension which was granted and the hearing was rescheduled for August 26, notice of which was sent to Randall on August 9. Her attorney was notified on August 22, but neither Randall nor her attorney appeared on the 26th for the hearing. The hearing was again rescheduled, time for September 9 and notice was sent to Randall, which she says she did not receive, and to her attorney, which was received. On September 9, 1991 neither Randall nor her attorney appeared. The committee rescheduled the hearing, setting September 27 as the final date, and gave Randall notice by hand delivery on the 26th. Randall responded that since she had recently left the Army, "my schedule is not flexible enough to allow me to attend your hearing

without compensation," Randall did not show for the last scheduled hearing.

On September 27, 1991, the committee met and recommended that her privileges be limited and that their recommendation be forwarded to the Commander for final approval.[3] At the hearing, evidence was offered that Randall had trouble handling instructions, had completed a report for a procedure that never occurred, and showed poor judgment on a number of crucial occasions. One of Randall's supervisors, Dr. Kidd testified that Randall had committed numerous instances of faulty judgment, and that Randall's knowledge and clinical skills were no better than those of a first year medical student and below

[3]Practitioners who separate from the Army prior to resolution of their appeal are notified that the process will be completed as though they were still on active duty. AR 40-684-10(4).

90 to 95 percent of the nurse anesthetists at Womack. On March 23, 1992, the Army submitted the following instruction on Randall to the National Practitioner Data Base: "Restriction of clinical privileges-Incompetence."[4]

Randall brought this action against the United States and Colonel Kevin C. Kiley and Colonel Elmer M. Casey, in their official and individual capacities, alleging deprivations of he substantive due process rights by the limitations placed on her practice and the report to eh National Practitioner Data Bank. Second, she claimed she was denied procedural due process by the committee's

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[4]Later, the Army's Office of the Surgeon General issued a new adverse action report that replaced the language of the first report with the following: "Practitioner failed to demonstrate the clinical ability or knowledge to practice anesthesiology without supervision for patients rated ASA Classes 3-5."

failure to provide her notice of the July 11 hearing, denial of opportunity to attend the July 11 hearing and present witnesses, and denial of representation of counsel at the August 13 hearing. Third, she alleged money damages against the individual defendants.

Defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(6) for Randall's failure to make out a claim under which relief may be granted. Defendants argued that Randall had failed to establish a constitutional violation as required by *Siegert v. Gilley*, 500 U.S. 226 (1991). Defendants argued that Randall was afforded adequate due process throughout the administrative hearings. Further, defendants argued that the individual defendants enjoyed qualified immunity for three separate reasons: (1) Randall failed to make out a

constitutional violation, (2) superior officers enjoy immunity from suit from inferior officers, and (3) federal statutory law protects individuals who participate in the creation of medical quality assurance records from suit.

The district court granted the motion, finding first that Randall had failed to establish a violation of a Constitutional right as mandated by *Siegert*. The court found that Randall's voluntary resignation and the Army's refusal to extend her limited privileges did not result in a deprivation of property. The court also found that Randall's liberty interests, which she argued had been violated through "foreclosures from other employment opportunity resulting from injury to one's reputation" did not establish a violation of a recognized constitutional right. Further, the court concluded that

Randall's failure to participate in the Army's hearing process precluded her from challenging the merits of the Army's decision as well as the process afforded her. Finally, the court found that the individual defendants were immune from suit on three grounds: (1) Randall had failed to make out a constitutional violation, (2) under *Chappell v. Wallace*, 462 U.S. 296, 305 (1983), "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations[]" and (3) under 10 U.S.C. § 1102(g), a person who provides information or participates in reviewing a practitioner's medical quality assurance records shall not be civilly liable for such participation.

II.

We review *de novo* the district court's

dismissal of a complaint for failure to state a claim upon which relief may be granted. *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991), *cert.denied*, 112 S.Ct. 1475 (1992). A motion to dismiss should not be granted unless the plaintiff can prove no set of facts to support the claim and entitle the plaintiff to relief. *Mylan Lab, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). In reviewing the legal sufficiency of the complaint, this court must accept as true all well-pleaded allegations and must construe the factual allegations in the light most favorable to the plaintiff. *Id.* However, we are not so bound by the plaintiff's legal conclu-ions, since the purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint. *Schatz*, 943 F.2d at 489.

**A. Substantive Due Process**

The government's plea of qualified

immunity is grounded upon Randall's failure to set forth a constitutional deprivation in her complaint. Once a defendant has pleaded qualified immunity from suit, the courts should, at the pleading stage, clearly determine whether the plaintiff had an existing constitutional right at the time the defendant acted. *Siegert v. Gilley,* 500 U.S. 226, 232 (1991).

Randall asserts that she has a property interest in retaining her commission. Randall had only provisional privileges at Womack, and the Army has not affected that interest by refusing to extend to her full privileges. *See Shahawy v. Harrison*, 778 F.2d 636, 642-43 (11th Cir. 1985) (physician with staff privileges did not have a constitutionally protected property interest in his appli-

cation for additional privileges). Furthermore, Randall voluntarily left the Army and thereby abandoned any property interest she had as a practicing physician at Womack.

The facts of the case do not merit a finding that Randall's liberty interest was deprived. Randall argues that the Army's adverse action report entered into the National Practitioner's Data Bank has denied her the right to practice her profession free from an imposed stigma. In *Siegert v. Gilley*, 500 U.S. 226 (1991), and *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court held that action which inflicts a stigma on the reputation of a plaintiff causing that plaintiff hardship in obtaining employment is harm to reputation that does not rise to the level of a constitutional deprivation. These cases control, and we conclude that Randall was

not deprived of her liberty interest.

Randall also argues that the hearing process violated her substantive due process rights because the Committee's recommendation was arbitrary. We agree with the district court's conclusion that Randall may not challenge the substance of a finding conducted at a hearing which she requested and hen chose not to attend.

**B. Procedural Due Process**

Although no substantive right was violated, Randall had the right to pursue her occupation free of restrictions which the Government may implement only after due process. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Randall contends that the Army afforded her inadequate process throughout the proceedings. We find this contention meritless.

First, Randall argues that the committee's failure to provide her with reasons why it was meeting to consider her privileging status violated due process. At the hearing conducted January 9, 1991, Randall was present and heard the evidence introduced by the Army of her substandard care and deficient understanding of the field in which she practiced. Written notice of specific charges is not required where past events or discussion have provided a physician with notice of the adverse charges. *Yashon v. Hunt,* 825 F.2d 1016, 1025 (6th Cir. 1987), *cert denied,* 486 U.S. 1032 (1988).

Second, Randall argues that she was denied due process by not being allowed to attend the July 11 hearing. At the July 11 hearing, the committee issued a recommendation to place limitations on Randall's practice. At the next hearing,

Randall was to have the opportunity to contest the recommendation and present evidence. She was given proper notice of this hearing on four separate occasions, failed to show for unexplained reasons at the first two hearings, and then failed to appear at the final hearing claiming an inflexible schedule. By failing to appear at the final scheduled hearing, Randall is now foreclosed from objecting to the process afforded her. See AR 40-68 ("Failure to request a hearing or failure to appear at the hearing, absent good cause, constitutes waiver of the hearing and appeal rights.")

Third, Randall claims that she was denied representation of counsel. Army regulation 40-68 permits counsel to advise the practitioner but not to participate directly at the hearing. Courts have held in situations similar to the Army's cre-

dentials committee's hearing that due process is satisfied by counsel's presence, without formal representation, at a hearing. *See Woodbury v. McKinnon*, 447 F.2d 839, 844 (5th Cir. 1971). *See also Yashon*, 825 F.2d at 1026 (no constitutional right to counsel at proceedings held to evaluate a physician's application for membership on a hospital's staff). Randall's due process rights were not violated by the Army's regulation which permits counsel to be present and advise the client but not to question witnesses or present argument at a credentials committee's hearing.

III.

We find the individual defendants are qualifiedly immune from suit based on Randall's failure to establish a constitutional violation and 10 U.S.C. §1102(g), which grants civil immunity to a person

who provides information for or participates in the review of a practitioner's medical quality assurance records. While the district court also applied *Chappell v. Wallace*, 462 U.S. 296 (1983), to bar Randall;s suit against the individual defendants, we think our holding in *Mickens v. United States*, 760 F.2d 539, 540 (4th Cir. 1985), *cert. denied*, 474 U.S. 1104 (1986), is more germane to the immediate case, since *Mickens* established that superior officers are immune from suit brought by subordinate officers.

IV.

For the reasons given, the district court's order is

*AFFIRMED.*

# APPENDIX B

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

## MAY 20, 1993

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NORTH CAROLINA**
**FAYETTEVILLE DIVISION**

**No. 92-96-CIV-3-BR**

| | | |
|---|---|---|
| **SHIRLEY M. RANDALL, M.D.,** | ) | |
| | ) | |
| *Plaintiff,* | ) | |
| | ) | |
| v. | ) | **O R D E R** |
| | ) | |
| **UNITED STATES OF AMERICA, et al.,** | ) | |
| | ) | |
| | ) | |
| *Defendants.* | ) | |

Pending before the court are defendants' motions to dismiss the complaint and to dismiss the individual defendants and Biven allegations. Also pending is a petition to withdraw as counsel entered by plaintiff's attorneys Edward E. Hollowell and Barry H. Bloch. The issues have been fully briefed and these matters are ripe for disposition.

## I. FACTS

Plaintiff, Dr. Shirley Randall, alleges that rights guaranteed to her by

the Due Process Clause of the Fifth Amendment were violated when defendant Army officials took action to limit her privileges to practice anesthesiology at Womack Army Community Hospital ("Womack") and then gave notice of that limitation to the National Practitioner Data Bank.

Dr. Randall is a former United States Army physician. She entered the service of the Army in June of 1984, and was voluntarily discharged on or about 22 August 1991. The record of this case contains numerous assessments of the quality of medical care rendered by Dr. Randall during that time. Without discussing them in detail, it suffices to say that a number of the reports include praise for Dr. Randall and high estimations of her work, while others express serious concerns regarding, for example, her ability to take directions,

to function without supervision, and to react to crisis situations.

Most of the events giving rise to this action occurred after Dr. Randall arrived at Womck on 10 January 1990. Because her posting to Womack was a change of duty station (Dr. Randall previously was stationed at Fort Sam Houston in Texas nd Fort Polk in Louisiana), she was given provisional (conditional) privileges to practice anesthesiology with qualified supervision for a period of 365 days.[1] Army regulations provide that the "[f]ailure to attain and retain required

[1]Provisional or conditional privileges routinely are extended to practitioners upon their arrival at a new medical facility pursuant to Army Regulation ("AR") 40-68 4-2(a)(4). The provisional privileges last for one year. Id. 4-2(a)(4)(a). Provisional privileging in this context is not an adverse professional action and is not reportable to the National Practitioner Data Bank.

proficiency levels for defined privileges by the end of the provisional period will require an evaluation as to whether revocation or permanent restriction of privileges is appropriate." AR 40-68 4-2(a)(4)(b). On 8 January 1991, the credentials committee met to evaluate Dr. Randall and to consider a possible adverse privileging action against her on grounds that she could not function as an independent anesthesiologist. Both Dr. Randall and her attorney were present for the hearing, which lasted roughly six hours. At that hearing, Dr. Randall called and questioned witnesses, presented evidence, and rebutted allegations of substandard care and deficient knowledge. She made clear that she knew the reason for the hearing was that he could not "operate independently as an anesthesiologist" (Tr. of Hrg. at 132), and was aware

of the significance of that charge. As Col. Blaedel explained, "The Army pays us to be independent practitioners. The whole point of this afternoon is, even though, by name, Dr. Randall has been functioning under acceptable credentials, in fact, she is not performing as an independent anesthesiologist." (Tr. of Hrg. at 34-35.) The credentials committee elected to continue Dr. Randall's provisional privileges for a period of five months and gave notice of that result to her on 22 January 1991.

At the end of the five month period, credentials committee chairman Col. Blaedel notified Dr. Randall that her provisional privileges were being extended for an additional month and that the committee would meet after 21 June 1991 to again evaluate the status of her privileges. On 11 July 1991 the committee met

and recommended limitation of Dr. Randall's privileges to practice anesthesiology due to her "inability to practice as an independent anesthesiologist." The committee's decision to recommnd limitation was not binding and could not take effect unless recommended by the Commander. AR 40-68 4-1(d). The committee recommended that Dr. Randall be permitted to perform more "simple" anesthetics without supervision, but restricted her ability to perform more complex cases. The recommended action was an adverse licensing action and therefore would, once final, be reported to the National Practitioner Data Bank.[2]

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[2]The National Practitioner Data Bank was instituted in 1990 to "improve the quality of medical care by encouraging physicians, dentists, and other health care practitioners to identify and discipline those who engage in unprofessional behavior; and to restrict the ability of incompetent physicians,

Dr. Randall was not given advance notice of this meeting. She received notice of the recommended limitation on 30 July 1991, and was informed of her right to challenge that recommendation in a hearing before the credentials committee. Dr. Randall acknowledged that failure to request or appear at that hearing would waive her right to appeal to a higher medical authority. She requested a hearing and it was scheduled for 13 August 1991. In pertinent part, the notice stated:

> The credentials committee will hold the hearing on 13 August 1991 at 0830 hours in the Emerson Conference Room. You have the right to be present, to present evidence and call witnesses in your behalf, to cross

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dentists and other health care practitioners to move from state to State without disclosure or discovery of the practitioners previous damaging or incompetent performance." U.S. Dept. of Health & Human Svcs., National Practitioner Data Bank Guidebook 1.

> examine witnesses called by the committee, to consult legal counsel, and to be advised by legal counsel at the hearing, however you may not be represented by counsel, . . .
>
> Failure to appear at the hearing will constitute a waiver of both the rights listed here and the right to appeal.

[Notice from Kevin Kiley to Shirley Randall of 1 August 1991.) Dr. Randall acknowledged receipt of the notice and gave the committee written notice that she intended to attend the hearing and would be advised at the hearing by her lawyer, Edward Hollowell of Raleigh, North Carolina. On 6 August her attorney contacted Fort Bragg Judge Advocate linda Taylor to request a continuance, and on 7 August Dr. Randall also asked for a continuance to permit her lawyer to assist in preparation for the hearing. The hearing was rescheduled for 26 August and notice was sent to Dr. Randall on 9 August. Dr.

Randall's attorney was notified of the new date on 22 August but Dr. Randall did not respond or appear at the hearing. The hearing again was rescheduled, this time for 9 September, and notice was sent to both Mr. Hollowell nd Dr. Randall via certified mail. Mr. Hollowell's office apparently accepted the letter on 3 September, but Dr. Randall did not claim her letter. Dr. Randall again did not appear. By notice dated 12 September, the chairman of the credentials committee summarized efforts made to schedule the hearing and informed Dr. Randall that

> [b]ecause of the seriousness of this matter and in order to afford you due process, your credentials hearing is being rescheduled one last time. The date for the rescheduled meeting is 27 September 1991 at 0900. If you fail to appear, the decision of the 11 Jul[y] 91 committee meeting that recommended limiting your privileges will be forwarded to the hospital Commander for his approval.

(Letter from Kevin Kiley to Shirley

Randall of 9/12/91.) Dr. Randall received the notice quoted above by hand delivery on 26 September 1991. She responded via a written notice to the committee, dated 26 September, and stated that since she had just separated from the Army, "[M]y schedule is not flexible enough to allow me to attend your hearing without compensation." (Letter from Shirley Randall to Commander, Womack Army Community Hospital of 9/26/91.) Dr. Randall did not attend the 27 September hearing. On that date, the Committee met and recommended that her privileges be limited and that the recommendation be forwarded to the Commander for final action.

Minutes of the meeting show that the discussion focused on issues and allegations substantially similar to those addressed in the 8 January 1991 hearing, which Dr. Randall did attend. The minutes

of both meetings show that Dr. Randall's performance concerned a number of her peers. For example, other doctors had reported that Dr. Randall would not take advice or instruction from peers superior to her in experience but inferior in rank, would not consult with superiors as directed, had completed a report documenting a successful anesthesia and recovery for an anesthesia that did not occur, and had an unsatisfactory level of clinical knowledge and judgment for her level of training. After discussing these concerns, the committee voted to recommend limitation of her privileges. The limitation was approved by Commander Elmer Casey, M.D., and notice of the limitation was sent to Dr. Randall on 7 October 1991. Dr. Randall was informed that she could anesthetize ASA Class 1 and 2 patients without supervision, could anesthetize ASA

Class 3-5 patients only with supervision and after consultation with the supervising anesthesiologist, and could not perform pediatric cases below the age of six or cases involving central line placement without supervision. On 4 November 1991, the limitation became effective. It was reported to the National Practitioner Data Bank on 23 March 1992 as follows: "RESTRICTION OF CLINICAL PRIVILEGES - INCOMPETENCE."

Dr. Randall contends that entry of he Adverse Action Report against her has caused irreparable injury. She has disputed the Adverse Action Report and her objections are included in the report itself. Dr. Randall also sought to appeal to the Commander, Army Health Services Command, but Army officials informed her that her appeal would be heard because her refusal to attend the hearing she

requested forfeited her appeal rights. She attempted to settle the dispute by contacting the Office of the Surgeon General, United States Army, but was advised that the matter would be reopened. She did not appeal to the Army Board of Correction of Medical Records, although that avenue was available to her. Dr. Randall brought this action against the following defendants: the United States of America and United States Army; Secretary of the Army Michael P. Stone, Secretary of Health and Human Services Louis Sullivan, Surgeon General of the Army Alcide M. LaNoue, Lt. Col. John T. Wilcox, and Lt. Col. William D. Strampel, in their official capacities only[3]; and

[3]Because these defendants are sued only in their official capacities, those individual defendants who have since been succeeded in office are no longer a part of this action and their successors should be substituted as defendants. Kentucky v.

Col. Kevin C. Kiley, Col. Elmer M. Casey, and other unknown Army defendants, sued in both their official and individual capacities.

Dr. Randall alleges three claims for relief. First, she asserts that she has a "right[] under the [D]ue [P]rocess [C]lause of the Fifth Amendment . . . not to be deprived of liberty or property without basis in fact for the publication to the National Practitioner Data Bank proclaiming the Plaintiff's 'incompetence' or without basis in fact underlying the restriction of clinical privileges reported to the National Practitioner Data Bank." Next, she argues that the defendants violated her due process right "not to be deprived of liberty or property absent a fair procedure." Subsumed within

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Graham, 473 U.S. 159, 166 n.11 (1985).

this second constitutional claim is a statutory claim that defendants failed to abide by the requirements of 42 U.S.C. § 11133(a) (3)(B) in that they did not provide a "description of the acts or omissions or other reasons for the adverse action" in the report sent to the Data Bank. Dr. Randall's third and final claim for relief concerns money damages against the two defendants sued in their individual capacities.

While these motions to dismiss were pending, the court conducted a hearing on Dr. Randall's motion for a preliminary injunction and denied the requested relief. After that hearing, the Army's Office of the Surgeon General issued a new Adverse Action Report that replaced the initial report with the following language:

Practitioner failed to demonstrate

> the clinical ability or knowledge to practice anesthesiology without supervision for patients rated ASA Classes 3-5.

The Data Bank is required to send the amended report to any institutions who previously requested information about Dr. Randall and to send only this report in response to future inquiries. The court turns now to the pending motions.

## II. DISCUSSION

### A. Defendants' Motions to Dismiss

Among other defenses, defendants claim that they are entitled to qualified immunity. Qualified immunity is an immunity from suit, so the threshold issue before the court is "whether the plaintiff has asserted a violation of a constitutional right at all." Seigert v. Gilley, 111 S. Ct. 1789, 1793 (1991). In Seigert, the Supreme Court focused on the "analytical structure under which a claim of

qualified immunity should be addressed" and held that petitioner Seigert "failed to satisfy the first inquiry in the examination of such a claim,; he failed to allege the violation of a clearly established constitutional right." Id.

The facts of Seigert are similar to those presently before the court and serve to frame the issues in the instant case. Plaintiff in Seigert was a clinical psychologist who worked primarily with mentally retarded children at St. Elizabeth's Hospital, a federal government facility located in Washington, D.C. He was given notice from St. Elizabeth's that he soon would be terminated from employment because he did not reliably report for duty, did not comply with supervisory directives, and had accumulated absences without leave. Id. at 1791. Pursuant to an agreement with hospital

officials, Seigert decided to resign to avoid an official termination. He took similar employment at an Army hospital in Bremerhaven, West Germany, and signed a "Credential Information Request Form" authorizing St. Elizabeth's to release personnel information regarding his job performance an medical privileges. Id. Seigert needed to be credentialed and eligible for privileges in order to permanently hold the position. In response to the Army's request for information, Seigert's former supervisor issued a written reply stating that he "could not recommend (Seigert) for privileges as a psychologist" because he "consider(ed) Dr. Seigert to be both inept and unethical, perhaps the least trustworthy individual (he had) supervised in [his] thirteen years at (St. Elizabeth's)." The Army Credentials Committee received this letter

and informed Seigert that he would not be credentialized because "reports about him were 'extremely unfavorable.'" Id. Seigert subsequently was tuned down by a Stuttgart Army hospital and returned to Bremerhaven to work under provisional privileges and only with adults. He sought to obtain full credentials by appealing to the Office of the Surgeon General, but was denied. He was terminated from federal employment in his field a short time later. Id.

After learning about his former supervisor's letter, Seigert sued Gilley on grounds that the disparaging letter had caused him to lose his position at Bremerehaven and had "rendered him unable to obtain other appropriate employment in the field." Id. at 1792. Seigert claimed that Gilley had published the defamatory statement maliciously, in bad faith, and

with knowledge that it was untrue or with reckless disregard as to its truth. Id. Defendant Gilley moved to dismiss or for summary judgment on grounds he was entitled to qualified immunity and that Seigert's factual allegations, even if true, did not establish the violation of any constitutional right. Id. The Supreme Court summarized Seigert's claim as follows:

> [Seigert] contended that the loss of his position at the Bremerhaven Hospital , followed by the refusal of the Army hospital in Stuttgart to consider his application for employment, and his general inability to find comparable work because of Gilley's letter, constituted . . . a deprivation [of a liberty interest guaranteed to him by the Fifth Amendment.]

Id. at 1793. The Supreme Court found that Seigert had "failed to establish the violation of a constitutional right at all," id. at 1794, because his claim basically was that he had been defamed and

his reputation damaged -- both grievances that are actionable as torts but not as violations of the federal Constitution. For the reasons set out infra, the court finds that Seigert substantially controls the court's disposition of defendants' motions.

1. Plaintiff's Substantive Due Process Claim

Plaintiff's first claim is that she has a "right() under the [D]ue [P]rocess [C]lause of the Fifth Amendment . . . not to be deprived of liberty or property without basis in fact for the publication to the National Practitioner Data Bank proclaiming the Plaintiff's 'incompetence' or without basis in fact underlying the restriction of clinical privileges reported to the National Practitioner Data Bank." After careful review of the record of this case, the

court determines that Randall, like Seigert, has failed to make out the violation of a constitutional right. In this claim, plaintiff apparently means to challenge the accuracy of the underlying facts that led defendants to limit her privileges and then to report that limitation to the Data Bank. In short, she contends that her privileges should not have been restricted and that the report of the limitation should not have stated only "incompetence" as the rationale.

Plaintiff has not established that any property interest has been unconstitutionally infringed. She cannot allege that defendants' actions deprived her of a property interest in government employment because she left the Army of her own volition. Nor can plaintiff show that future government employment has been "foreclosed" to her: Her privileges were

limited only at Womack, and she has not sought other government employment. Plaintiff also offered no authority to show that she or any other physician has a protected interest in obtaining, as opposed to retaining, full medical privileges. The fact that potential employers in the private sector might not hire plaintiff due to concerns about the Data Bank entry likewise implicates no property interest.

To establish a violation of a liberty interest, plaintiff argues that "foreclosure from other employment opportunity resulting from injury to one's reputation gives rise to protections of the liberty interest under the Fifth Amendment." Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction at 9-10 [hereafter Plaintiff's Mem.] [citing Board of Regents v. Roth, 408 U.S. 564

(1972) ]. Plaintiff contends that the limitation of her privileges and the report sent to the Data Bank will damage her professional reputation and adversely affect her future job opportunities. This may well be true, but the fact that plaintiff's professional reputation may be compromised does not result in the violation of any constitutional right. The Supreme Court made clear in the series of decisions which culminated in Seigert that whatever liberty and property interests inhere in one's reputation, damage to that reputation "fail[s] to establish the violation of a constitutional right at all." Id. at 1794; see also Paul v. Davis, 424 U.S. 693, 708-09 (1976) (holding that injury to reputation by itself is not a "liberty" interest protected under the Fourteenth Amendment).

As to plaintiff's argument that the

Due Process Clause of the Fifth Amendment requires a "basis in fact" for a credentialling action undertaken pursuant to AR 40-68, the court notes that plaintiff had an opportunity to request a hearing specifically to address the alleged facts underlying the proposed limitation, was informed that if she elected not to request and appear at a hearing she would not be permitted to appeal the committee's decision to higher Army authorities, did request the hearing, but then refused to attend it without compensation. Having opted to disregard the proper venue to make her objections and to challenge the proposed limitation, plaintiff may not call on this court to review the wisdom of her peers' assessment of her abilities.

2. Plaintiff's Procedural Due Process Claim

Plaintiff next argues that the procedure by which her privileges were limited was constitutionally deficient. Again, the court must first establish whether the asserted liberty or property interest in entitled to protection before determining what process, if any, is due. The court already has established that change to plaintiff's reputation did not violate plaintiff's right to due process. Plaintiff does, however, have the right to pursue her occupation and may not be restricted by government action absent due process. In this case, the record before the court -- interpreted in the light most favorable to plaintiff -- shows that the credentials committee met in plaintiff's absence and without notice to her and decided to recommend that her privileges be restricted. The 11 July hearing, however, resulted only in a proposed

limitation -- not in the restriction of plaintiff's privileges. Though plaintiff appears to find this distinction merely semantic, it is not. While plaintiff may have believed that her participation in the hearing would be pointless, that opinion did not entitle her to bypass institutional due process protections in hopes of obtaining others at a later stage in the proceedings.

Plaintiff offers authority to support her argument that she was entitled to a full and confrontation-based hearing, see, e.g., Roth, 408 U.S. 564; Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), but offers no authority for the proposition that plaintiff could disregard the full hearing provided for her and still be entitled to further process. The court is aware that 42 U.S.C. § 11112 (b)(3)(C)(i) stipulates

that practitioners are entitled to be "represented" by counsel at a credentials hearing, and that AR 40-68 permitted plaintiff to be "advised" but not "represented." However, both AR 40-68 and the statute also provide that the "right to a hearing may be forfeited if the physician fails, without good cause, to appear." § 11112(b)(3)(B). Accordingly, the court need not inquire into the effect of the statute on AR 40-68. The court finds that the Army extended to plaintiff substantially all the process to which she was entitled, that plaintiff removed herself from the process without cause, and that defendants owed plaintiff nothing further.

3. Plaintiff's Claim for Money Damages

In her third and final claim, plaintiff seeks to recover damages against

the individual defendants sued in their personal capacities. She argues that defendants Kiley, chairman of the credentials committee, knew or should have known that she did not receive due process with respect to the restriction of her privileges and that the report to the Data Bank would result in damage to her reputation and impair her ability to practice her chosen profession and earn her livelihood, but still submitted the recommendation to Commander Casey. Defendant Casey, she contends, knew or should have known that Kiley failed to protect plaintiff's right to due process, but still approved the committee's recommendation. She seeks both compensatory and punitive damages from these defendants. Defendants state that they are entitled to immunity from suit on two grounds. First, they contend that plaintiff has not alleged the

violation of a clearly established constitutional right and that they therefore are entitled to qualified immunity. As a separate basis for dismissal they argue that Congress has enacted legislation which protects participants in military medical privileging actions from civil liability.

Defendants' assertion of qualified immunity also warrants dismissal of this claim. For the reasons set out with respect to the dismissal of plaintiff's first and second claim, the court reiterates that Plaintiff failed to established the deprivation of any "clearly established" liberty or property interest guaranteed under the Due Process Clause of the Fifth Amendment. Aside from the qualified immunity defense, plaintiff's third claim should be dismissed for two additional reasons.

In Chappell v. Wallace, 462 U.S. 296, 305 (1983), the Supreme Court held that due to special factors arising from the "special relationships that define military life . . ., enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." The Fourth Circuit Court of Appeals relied on the Chappell reasoning in Mickens v. United States, 760 F.2d 539, 540 (4th Cir. 1985), cert. denied, 474 U.S. 1104 (1986), and explained that it also applied in a "suit brought by a subordinate officer against a superior officer, because in either case, regardless of the identity of the subordinate, military discipline and Congress" plenary authority would be hampered if a subordinate were allowed to hale his superiors into a civilian court." It is apparent to the court that

plaintiff's Bivens claims, arising as it did in the context of her military service, is barred.

Plaintiff's claim also is barred by statute. Title 10, Section 1102(g) of the United States Code provides:

> A person who participates in or provides information to a person or body that reviews or creates medical quality assurance records . . .shall not be civilly liable for such participation or for providing such information if the participation or provision of information was in good faith based on prevailing professional standards at the time the medical quality assurance program activity took place.

§ 1102(g) (emphasis added). A "medical quality assurance program" includes "any activity carried out . . . by or for the Department of Defense to assess the quality of medical care, including activities conducted by individuals . . . or other review bodies responsible for quality assurance [or] credentials . . .

." § 1102(j)(1). The evidence shows that the allegedly unconstitutional acts come well within this definition. Though plaintiff believes that she was "drummed out of the corps" and contends that defendants Kiley and Casey acted "without basis in fact" and with "reckless, wanton, and heedless indifference to the effect" of their actions, the voluminous record of this case includes no evidence to substantiate these allegations or to contradict defendants' assertions that they acted in good faith at all times. Accordingly, the court finds that plaintiff's claim is barred by statute as well.

## III. CONCLUSION

This action may well have been averted had defendants issued a more detailed report to the Data Bank when they first reported the limitation of

plaintiff's privileges. While the report as worded did not violate any of plaintiff's constitutional rights, it suggests a callous indifference to the stigma invariably attracted to an individual labeled "incompetent." Actions affecting a physician's credentials are of vital importance to the quality of medical care available to the public and are of particular import to the affected physician. Obviously, they should be undertaken with deliberation and a focussed sense of the action's purpose. While the minutes of the credentials committee's meetings do reflect a high level of attention to detail, the wording of the initial report to the Data Bank evidences a lapse of judgment that has, understandably, caused great distress to Dr. Randall. The revised report is more in keeping with the purpose of the limitation and the Army is

to be commended for retracting its original report.

For the reasons stated above, defendants' Motions to Dismiss are GRANTED and this action is DISMISSED. Plaintiff's attorneys' Petition to Withdraw is ALLOWED.

This 20 May 1993.

"s/_____".
W. EARL BRITT
United States District Judge

# APPENDIX C

## JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

## MAY 21, 1993

**UNITED STATES DISTRICT COURT**

Eastern District of North Carolina

Shirley M. Randall, M.D.,

Plaintiff, *JUDGMENT IN A CIVIL CASE*

v. Case No: 92-96-Civ-3-BR

United States Of America; United States Department of The Army; Donna E. Shalala, Secretary of Health and Human Services; Michael P. W. Stone, Secretary of the Army Alcide M. Lanoue, General, Surgeon General of the Army; Kevin C. Kiley, Colonel, individually and in his official capacity as Deputy Commander for Clinical Service and Chairman of the Credentials Committee for Womack Army Community Hospital; Elmer M. Casey, Colonel, individually and in his official capacity as Commander of Womack Army Community Hospital; John T. Wilcox, Lieutenant Colonel, in his official capacity; William D.Strampel, Lieutenant Colonel, Chief of the Quality Assurance Division of the Army, Unknown Named Members of the US ARMY,

Defendants.

_____ Jury Verdict. This action came before the Court for trial and the jury has rendered its verdict.

_____ Decision by court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that the Motions to Dismiss filed the by Defendants are GRANTED; and the Plaintiff, SHIRLEY M. RANDALL, M.D., shall have and recover nothing of the Defendants and this case is hereby DISMISSED. (BRITT, J)

This judgment filed and entered on May 21, 1993 and copies mailed to:

Thomas F. Loflin, III
Attorney at Law
Box 1315
Durham, NC 27702

Thomas P. Swaim
US Attorney's PO Office
310 New Bern Avenue,
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Raleigh, NC 27601

Vincent M. Garvey
US Dept. of Justice
Fed. Programs Branch,
Civil Division
901 E Street, NW
Washington, D. C. 20530

May 21 1993
Date

David W. Daniel
Clerk

"s/"
(By) DEPUTY CLERK

# APPENDIX D

## ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AUGUST 22, 1994

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed
August 22, 1994

No. 93-1792
CA-92-96-3-BR

Shirley M. Randall, M.D.,

Plaintiff-Appellant,

v.

United States Of America; United States Department of The Army; Donna E. Shalala, Secretary of Health and Human Services; Michael P. W. Stone, Secretary of the Army Alcide M. Lanoue, General, Surgeon General of the Army; Kevin C. Kiley, Colonel, individually and in his official capacity as Deputy Commander for Clinical Service and Chairman of the Credentials Committee for Womack Army Community Hospital; Elmer M. Casey, Colonel, individually and in his official capacity as Commander of Womack Army Community Hospital; John T. Wilcox, Lieutenant Colonel, in his official capacity; William D.Strampel, Lieutenant Colonel, Chief of the Quality Assurance Division of the Army, Unknown Named Members of the US ARMY,

*Defendants - Appellees*

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On Petition for Rehearing with

Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

_____

Clerk

# APPENDIX E

## COMPLAINT FOR EQUITABLE AND MONETARY RELIEF AND DEMAND FOR JURY TRIAL

AUGUST 31, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

File No. 92-96-CIV 3BR

| | |
|---|---|
| SHIRLEY M. RANDALL, M.D., Plaintiff, | |
| v. | COMPLAINT FOR EQUITABLE AND MONETARY RELIEF AND DEMAND FOR JURY TRIAL |
| United States Of America; United States Department of The Army; Donna E. Shalala, Secretary of Health and Human Services; Michael P. W. Stone, Secretary of the Army Alcide M. Lanoue, General, Surgeon General of the Army; Kevin C. Kiley, Colonel, individually and in his official capacity as Deputy Commander for Clinical Service and Chairman of the Credentials Committee for Womack Army Community Hospital; Elmer M. Casey, Colonel, individually and in his official capacity as Commander of Womack Army Community Hospital; John T. Wilcox, Lieutenant Colonel, in his official capacity; William D. Strampel, Lieutenant Colonel, Chief of the Quality Assurance Division of the Army, Unknown Named Members of the US Army, | No. 93-1742 |
| *Defendants.* | |

Complaining of the Defendants, the Plaintiff alleges:

## I. INTRODUCTION

1. This is a civil action brought by the Plaintiff above-named to seek injunctive and declaratory relief and relief in the nature of mandamus for the deprivation of rights, privileges, and immunities secured to her under the Constitution and laws of the United States. this civil action also seeks monetary and punitive damages from those Defendants sued in their individual capacities.

## II. JURISDICTION

2. This Court has jurisdiction over Plaintiff's claims for relief under 28 U.S.C. 1331, 1346(a)(2) and 28 U.S.C. 1361. Venue in this Court lies under 28 U.S.C. 1391(e) and 28 U.S.C. 1402(a). This Court has jurisdiction to issue a declaratory judgment in accordance with 28

U.S.C. 2201 and 2202.

## III. PARTIES

3. The Plaintiff, Shirley M. Randall, is a citizen and resident of the State of North Carolina, Cumberland County.

4. The Defendant United States Army is an agency or department of the United States created and existing by virtue of the laws of the United States.

5. The Defendant Michael P.W. Stone is, and was at times material hereto, Secretary of the Army of the United States and is sued in his official capacity only. He has responsibility for all operations of the United States Army and has supervisory responsibility over the manner in which the other military Defendants perform their duties as public officers of the United States Army.

6. The Defendant Louis Sullivan is,

and was at times material hereto, Secretary of Health and Human Services of the United States and is sued in his official capacity only. He has responsibility for all operations of the United States Department of Health and Human Services and has final supervisory responsibility over the National Practitioner Data Bank, which the Secretary established pursuant to statues of the United States, 42 U.S.C. 11101, et seq.

7. The Defendant Gen. Alcide M. LaNoue is, and was at times material hereto, Surgeon General of the Army of the United States and is sued in his official capacity only. He has responsibility for all operations of the Army's Medical Corps and has supervisory responsibility over the manner in which other Defendants perform their duties as public officers of

the United States Army.

8. The Defendant Col. Kevin C. Kiley is, and was at times material hereto, the deputy commander for Clinical Services and chairman of the Credentials Committee for Womack Army Community Hospital, which is a medical facility of the United States Army located at Fort Bragg, within the Eastern District of North Carolina. In such capacity, the Defendant Kiley was responsible for the procedures of the Credentials Committee which made a recommendation to the commander of Womack Army Community Hospital on the extent or limits for the Plaintiff to practice anesthesiology without affording Plaintiff procedural and substantive due process mandated by the Constitution of the United States. He is being sued in both his individual and official capacities.

9. The Defendant Col. Elmer M. Casey is, and was at times material hereto, commander of Womack Army Community Hospital. In such capacity, the Defendant Casey limited the Plaintiff's privileges for the practice of anesthesiology without assuring Plaintiff had been afforded procedural and substantive due process mandated by the Constitution of the United States. He is being sued in both his individual and official capacities.

10. The Defendant Lt.Col. John T. Wilcox is, and was at times material hereto, a member of the United States Army assigned to the Defendant Army Surgeon General in Falls Church, Virginia. In such capacity, the Defendant Wilcox was responsible for the preparation of and submission of an Adverse Action Report to the National Practitioner Data Bank reporting adverse professional action by

the Army against Plaintiff wherein Plaintiff was denied both procedural and substantive due process by the Army mandated by the Fifth Amendment to the Constitution of the United States. He is being sued in official capacity only at this time.

11. The Defendant Lt.Col. William D. Strampel is, and was at times material hereto, chief of the Quality Assurance Division of the Army. He has refused to rescind the aforesaid Adverse Action Report, notwithstanding a denial of Plaintiff's constitutionally protected rights to procedural and substantive due process, when Plaintiff filed a challenge with the National Practitioner Data Bank to the aforesaid Adverse Action Report. He is being sued in his official capacity only at this time.

12. The Army Defendants "Unknown"

are, and were at times material hereto, those persons who participated in or directed other persons under their command or supervision to participate in recommending any adverse action with respect to Plaintiff professionally, or who took or directed any subordinates to take adverse professional action against plaintiff, without first affording Plaintiff procedural and substantive due process required by the Constitution of the United States or by Army regulations. These unknown members of the United States Army are being sued in their individual and official capacities.

## IV. ALLEGATIONS OF FACTS

13. The Plaintiff, Dr. Shirley M. Randall, received her doctor of medicine degree from the University of Virginia in 1981, and was licensed by the State of Virginia to practice medicine on August

16, 1982.

14. On July 9, 1984, Dr. Randall entered into the service of the United States Army, and remained in the United States Army until she was discharged on or about August 22, 1991.

15. After graduating from Medical School and completing an internship, she undertook a two-year residency to specialize in anesthesiology. At the time of her discharge from the Army, she was an anesthesiologist in the Army's Medical Corps.

16. From August 2, 1984, through June, 1987, Dr. Randall was assigned to the Army's Hospital in Heidelberg, Germany, where she was chief of the Anesthesiology and Operating Room Services.

17. The Performance Evaluations of Dr. Randall while she was stationed in

Heidelberg were uniformly high. Dr. Karl D. Bzik, chief of the Department of Surgery at Heidelberg, in his evaluation of Dr. Randall from August 2, 1984, through December 2, 1984, rated her as qualified to serve as the chief of Anesthesia and Operating Room Service and states: "In a short period of time, CPT Randall has demonstrated exceptionally outstanding performance of duty." (the 1984 Officer Evaluation Report, which is Attachment 1 to this Complaint, is incorporated herein.)

18. In the 1985 annual evaluation of Dr. Randall, Dr. Bzik called her "superior." In his rating comments, Dr. Bzik noted that Dr. Randall "is superbly trained and has consistently demonstrated the highest degree of professionalism.... She is an able diagnostician and is able to rapidly assess the situation during

anesthesia result in outstanding care to her patients ... She is not only an accomplished anesthesiologist but also an able administrator. She has been instrumental in coordinating the services into a functional whole which has allowed us to care for many more patients than programmed. She has been essential for the work of the Critical Care Committee." (Emphasis added). (The 1985 Officer Evaluation Report, which is Attachment 2 t this Complaint, is incorporated herein.)

19. In the 1985 annual evaluation of Dr. Randall, Dr. Bzik said her performance "continued to be outstanding ... Her conduction of anesthesia is outstanding and safe for patients and the surgical team. Her results are excellent. She is very dependable and in crises, she can be relied upon and function on her own ... She is also an outstanding proponent for

quality Assurance in her field." (Emphasis added). (The 1986 officer Evaluation Report, which is Attachment 3 to this Complaint, is incorporated herein.)

20. Dr. Michael McConnell, commander of the Army Medical Center at Heidelberg, in the 1986 evaluation of Dr. Randall, stated (see Attachment 3): "She has successfully led and managed the Anesthesiology Service to the successful completion of all goals and objectives... . She is an accomplished anesthesiologist who maintains the highest professional standards." (Emphasis added).

21. The Performance Assessment of Dr. Randall for the entire time she was at the Army's Heidelberg medical facility was the highest rating of "excellent' in 13 of 17 listed categories and "good'--the next highest rating--in the remaining 4

categories. (The Performance Assessment, which is Attachment 4 to this Complaint, is incorporated herein.)

22. On or about July 1, 1987, Dr. Randall entered into an assignment at the Army's Bayne Jones Community Hospital at Fort Polk, Louisiana, where she was Chief of Anesthesia and Operating Room Services.

23. As she had in Germany, Dr. Randall's received complimentary annual evaluations by her immediate supervisors and commander of Bayne Jones Community Hospital. The Officer Evaluation Report for fiscal 1987-88 (7/1/87-6/5/88), which is Attachment 5 to this Complaint, is incorporated herein.

24. In the Officer Evaluation Report for fiscal 1988-89 (6/6/88-5/29/89), which is Attachment 6 to this Complaint and is incorporated herein, it was pointed out that Dr. Randall

implemented procedures which enabled the hospital at Fort Polk to provide medical care to a greater number of patients during a period of limited resources. "This has been done while maintaining an excellent quality of care." (Emphasis added).

25. The two Performance Assessments of Dr. Randall for the two years she was at the Army hospital at Fort Polk gave her the highest rating of "excellent' in the three clinical performance categories. Only in the categories dealing with interpersonal skills did she receive less than 'excellent' or 'good" ratings. (The Performance Assessments for fiscal 1987-88 and 1988-89, which is Attachment 7 to this Complaint, are incorporated herein.)

26. In none of the five years that Dr. Randall was chief of anesthesiology at the Army's medical facilities in

Heidelberg, Germany, and Fort Polk, Louisiana, was there any anesthesia mistake. Dr. Joseph M. Smith, chief of the Department of Surgery at Fort Polk and Dr. Randall's immediate supervisor during 1988-1989, informed the Defendant Army in a letter dated January 3, 1991: "Dr. Randall's professional performance was flawless, in that I cannot recall a single anesthesia mishap." (Emphasis added). (This letter, which is Attachment 8 to this Complaint, is incorporated herein.)

27. On or about January 10, 1990, Plaintiff arrived at Womack Army Community Hospital, Fort Bragg, North Carolina where the Army assigned her following her short tour of duty at Fort Sam Houston's Texas, where she had been assigned immediately after her tour of duty at Fort Polk, Louisiana. As provided in Army Regulation 40-68 (hereinafter referred to as AR 40-

68) because this was a change of duty station, Plaintiff received provisional privileges to practice anesthesiology, also referred to AR 40-68 as conditional privileges. Such provisional privileging is not adverse professional action and is not reportable to the National Practitioner Data Bank.

28. On or about January 22, 1991, Dr. Randall was continued on provisional privileges following a hearing before the Womack Army Community Hospital Credentials Committee. (This memorandum, which is Attachment 9 to this Complaint, is incorporated herein.)

29. On or about May 23, 1991, Dr. Randall was notified by the then Chairman of the Credentials Committee, Col. Mark E. Blaedel, that her provisional privileges to practice anesthesiology were being extended for an additional month and

that after June 21, 1991, "the Credentials Committee will meet in session to evaluate the status of your privileges." (Emphasis added.) (This Memorandum, which is Attachment 10 to this Complaint, is incorporated herein.)

30. All of the written evaluations and assessments of Dr. Randall after January 22, 1991, were at least satisfactory and led her to believe that she was considered to be performing 'competently' at the very least.

31. Two Evaluations of Privileges and Performance Assessments for Dr. Randall at Womack were done by Col. Lynn George for the periods May 16, 1990, to February 15, 1991, and February 16 through June 15, 1991. (The 1990-91 Evaluation and Assessment and 2/16-6/15/91 Evaluation and Assessment, which are Attachments 11, 12, 13, and 14 respectively to this Complaint,

are incorporated herein.) There is nothing found to be unsatisfactory about Dr. Randall's clinical knowledge and ability. Attachments 12 and 14 in numbered block 20 state that Dr. Randall has never been a defendant in a medical malpractice action.

32. A Performance Assessment of Dr. Randall by Major Kidd, M.D., who supervised Plaintiff during the month's extension pursuant to Attachment 10 to this Complaint, on June 25, 1991, recommended: "It is my opinion after observation of Dr. Randall during this five week period, that she be granted full clinical privileges at Womack Army Community Hospital." (This Assessment, which is Attachment 15 to this Complaint, is incorporated herein.)

33. Dr. Randall was not given any notice whatsoever of the date of the

Credentials Committee hearing, referred to in Paragraph 29 above. By Memoranda dated July 30, 1991 and September 12, 1991, from the Defendant Kiley as now chairman of the Credentials Committee, Dr. Randall learned after-the-fact that the Credentials Committee had met July 11, 1991, and recommended a limitation on her practice of anesthesiology. This result was adverse professional action against Plaintiff. Even with the recommended restrictions, the July 30, 1991, dated Memorandum sets forth certain anesthetizations that Dr. Randall was still permitted to perform unsupervised. (The Memoranda of July 30, 1991, and September 12, 1991, which are Attachments 16 and 17 respectively to this Complaint, are incorporated herein.)

34. The Memorandum dated July 30, 1991, was the first notice to Plaintiff

that the already-conducted hearing about her was under Army Regulation 40-68, which authorized limitation (also called restriction in AR 40-68) of clinical privileges based upon incompetence, unprofessional conduct or similar factors.

35. In neither of the Memoranda of July 30 or September 12, nor in any other communication, was Plaintiff Dr. Randall advised either before or after the secret committee hearing as to the specific charges against her, the specific finding against her under Army Regulation 40-68, and the specific factual reasons, if any, for the limitations on her clinical privileges. Not knowing of the date of the hearing, Plaintiff had no opportunity to attend same, no opportunity to confront witnesses, if any, against her, and no opportunity to rebut witnesses against her with testimony of her own or with other

witnesses or documents. Plaintiff also by being denied notice of the date, time, and nature of the hearing was denied the right to effective representation by counsel at such hearing.

36. In addition to the Memoranda referred to in Paragraphs 33 through 35, supra, on or about August 1, 1991, the Defendant Kiley signed as chairman of the Credentials Committee a Notice of Hearing to the Plaintiff, in which he declared that the Credentials Committee would conduct a hearing on August 13, 1991, "concerning allegations that may adversely affect your clinical privileges.' She was not informed of the charges against her, but that "[r]ecords concerning these (unspecified] allegations are available to you at the Quality Assurance office.' Plaintiff was further informed that "you may not be represented by counsel.'

Plaintiff personally went to the Quality Assurance Office and requested the records referred to in said Notice of Hearing, but was neither shown nor provided copies of any records referred to in said Notice of Hearing. A copy of this Notice of Hearing is attached hereto as Attachment 18, and is incorporated by reference herein.

37. On or about August 8, 1991, Dr. Randall was assigned to the Army Transition Center for processing out of the Army upon her resignation and honorable discharge.

38. Although out of the Army, Dr. Randall wrote a Memorandum in response to those of the chairman of the Credentials Committee (Attachments 16 and 17) and asked that her response be placed in her credentialing file. (Dr. Randall's Memorandum, which is Attachment 19 to this Complaint, is incorporated herein.)

39. On or about September 27, 1991, a "Special Credentials Hearing Committee" met and recommended again limiting Dr. Randall's clinical privileges, and Defendant Casey by Memorandum dated October 7, 1991, while stating he "approved" such recommendation actually limited Plaintiff's clinical privileges even beyond the recommendation of the "summary limitation.' (The Memorandum of October 7, 1991, which is Attachment 20 to this Complaint, is incorporated herein.)

40. On or about March 23, 1992, the Defendant Wilcox, and, Plaintiff alleges on information and belief, one or more of the Unnamed Defendants caused the preparation and submission of an Adverse Action Report (Attachment 21 to this Complaint, which is incorporated herein) which labeled Dr. Randall as professionally "incompetent" and which was

submitted to the National Practitioner Data Bank.

41. The Adverse Action Report submitted by the Defendant Army to the National Practitioner Data Bank through the Defendant Wilcox is severely injurious to the Plaintiff and subjects her to irreparable injury in that the National Practitioner Data Bank in Camarillo, California, is the central clearing house created by the Secretary of Health and Human Services of the United States pursuant to 42 U.S.C. 11101, et seq., where credentials qualifications, and competency of physicians are checked by hospitals other physicians, group practices, other health care providers, and insurers.

42. Plaintiff upon receipt of the Memorandum dated October 7, 1991, sought, as Defendant Casey's Memorandum advised she could, to appeal to the Commander,

Army Health Services Command, the limitation of clinical privileges. On or about the 3d day of December, 1991, Plaintiff was notified by said Command that it would not even entertain her appeal.

43. On or about the 22d day of June, 1992, Plaintiff was informed by Notice from the National Practitioner Data Bank that the Defendant Army had submitted to said National Practitioner Data Bank an Adverse Action Report. (A true copy of said Adverse Action Report, as sent Plaintiff by the National Practitioner Data Bank, is attached to this Complaint as Attachment 22, and is incorporated by reference herein.)

44. Even though Notice from the National Practitioner Data Bank, was dated May 21, 1992, it was mailed the Plaintiff- in an envelope postmarked June 19, 1992,

and actually received by Plaintiff on or about the 22d day of June, 1992.

45. After Plaintiff received the Notice from the National Practitioner Data Bank containing a copy of the aforesaid Adverse Action Report, Plaintiff duly notified the National Practitioner Data Bank that she desired to dispute the said Report. Plaintiff's statement to the National Practitioner Data Bank that she contested said Adverse Action Report and requested a hearing thereon by the Secretary of Health and Human Services in the event the Defendant Army refused to withdraw same was sent to the National Practitioner Data Bank on the 30th day of June, 1992. A true and accurate copy of Plaintiff's Notice and Request is incorporated by reference herein as Attachment 23.

46. Plaintiff, on or about the 30th

day of June, 1992, had
counsel advise the Defendant United States Army that she had filed a dispute concerning the Adverse Action Report submitted to the National Practitioner Data Bank, and requested the Army to resolve the dispute over its Adverse Action Report. A true and accurate copy of the request of Plaintiff's counsel to the Army is incorporated as Attachment 24.

47. on or about the 16th day of July, 1992, Plaintiff's counsel received a letter dated July 14, 1992, in which the Defendant Strampel, identifying himself as the chief, Quality Assurance Division, Office of the Surgeon General, United States Army, stated that the Army would not re-open Plaintiff's case.

48. on or about July 20, 1992, Plaintiff received a Dispute Acknowledgment from the National

Practitioner Data Bank dated July 15, 1992, advising that the Secretary of Health and Human Services "will not review the appropriateness of a health care entities [sic] professional review action (upon the request of the health care practitioner]." Consequently, Plaintiff has exhausted administrative remedies available to her. A true copy of said Dispute Acknowledgment as sent Plaintiff is attached to this Complaint as Attachment 25 and incorporated by reference herein.

V. FIRST CLAIM FOR RELIEF

49. The Plaintiff incorporates by reference Paragraphs 1-48 of this Complaint and incorporated attachments into her First Claim for Relief, the same as if fully set forth herein.

50. The subject of this First Claim for Relief is the violation by the

Defendants of the Plaintiff's rights under the due process clause of the Fifth Amendment to the Constitution of the United States not to be deprived of liberty or property without basis in fact for the publication to the National Practitioner Data Bank proclaiming the Plaintiff's "incompetence" or without basis in fact underlying the restriction of clinical privileges reported to the National Practitioner Data Bank.

51. The Defendant Army's own regulations, AR 40-68, define reasonable cause to establish a health care practitioner's incompetence to be the following: (1) a single incident of gross negligence; (2) a pattern of inappropriate prescribing; (3) a pattern of substandard care; (4) an act of incompetence or negligence causing death or serious bodily injury; (5) abuse of legal or illegal

drugs or diagnosis of alcohol dependence; (6) practitioner disability of either a physical or psychiatric nature; and (7) significant practitioner unprofessional conduct as defined by (k)(5) of Par. 4-9 of AR 40-68. This provision of AR 40-68 defines actions of unprofessional conduct to be: (a) fraud or misrepresentation that results in discharge from the service; (b) fraud or misrepresentation involving renewal of a contract for professional employment, application or renewal of clinical privileges, or extension of military service obligation; (c) cheating on a qualifying examination; (d) commission of a serious misdemeanor, defined to be a criminal offense punishable by confinement of over 30 days, a fine of over $1,000, or, if a military crime, punishable by punitive separation from the service; (e) the entry of a

guilty or no contest plea, or request for discharge in lieu of court-martial, where the health care practitioner is charged with a serious misdemeanor as defined above, or with a felony; or (f) making false or misleading statements to patients regarding clinical skills or clinical privileges, willfully or negligently violating physician-client confidentiality, being found impaired by reason of drug or alcohol abuse or alcoholism, intentionally aiding or abetting the practice of medicine or dentistry by obviously incompetent or impaired persons, committing an act of sexual abuse or misconduct related to the practice of health care, possessing or prescribing or dispensing or using any controlled substance other than for medically acceptable purposes, prescribing or providing a controlled substance for use

by the practitioner or family member of the practitioner violating any law concerning controlled substances, or committing fraud to obtain dual compensation contrary to federal statute. In addition, AR 40-68 defines unprofessional conduct to be failure to report to the proper authority any disciplinary action against the practitioner taken by professional or governmental organizations, failure to report to the clinical privileging authority any malpractice awards, judgments, or settlements, and the failure to report to the clinical privileging authority any sanction taken by a civilian licensing agency or health care facility.

52. At no time following the receipt by Plaintiff of the Memorandum of May 23, 1991, advising Plaintiff that the Credentials Committee would meet some time

thereafter to consider her privileging status was Plaintiff ever informed by the Defendants or anyone else of any of the specific bases set out in AR 40-68 to be reasonable cause to doubt a practitioner's competence to practice. Plaintiff committed none of the acts or omissions set out in AR 4068 during the relevant time period between January 8, 1991, and her separation from the Army on or about August 22, 1991, which would provide a basis in fact for a finding of incompetence. Moreover, Plaintiff knows of no basis in fact for limitation or restriction of clinical privileges recommended or taken by the Army between January 8, 1991, and October 7, 1991.

53. The actions by the Defendants in recommending, ordering, or permitting Plaintiff's clinical privileges to be limited or restricted on and after July

11, 1991, and in reporting or permitting being reported to the National Practitioner Data Bank that Plaintiff's clinical privileges had been restricted by Defendants for reasons of incompetency have been done arbitrarily, capriciously, and without any basis in fact whatsoever in violation of rights guaranteed to the Plaintiff by the due process clause of the Fifth Amendment to the Constitution of the United States. All named Defendants except Defendant Sullivan, and the Unknown Named Defendants, acted, or failed to act, as the case may be under color of their offices and positions with the Defendant United States of America and United States Army. Defendant Sullivan, acting through the National Practitioner Data Bank has permitted Plaintiff's restriction or limitation of clinical privileges for reason of incompetency to be entered into

the records of said Data Bank and has advised Plaintiff through said Data Bank that he will not review the actions of the other Defendants as to basis in fact.

VI. SECOND CLAIM FOR RELIEF

54. The Plaintiff incorporates by reference Pars. 1-48, and 50-53 of this Complaint into her Second Claim for Relief, the same as if fully set forth herein, including incorporated statements.

55. The subject of this Second Claim for Relief is the violation by the Defendants of the Plaintiff's rights under the due process clause of the Fifth Amendment to the Constitution of the United States not to be deprived of liberty or property absent a fair procedure, to include as a minimum notice in writing of the specific charges against her; notice of the time, date and place of any hearing at which those charges against

her would be considered, with the opportunity to present evidence and be heard before any decision or recommendations against her would be made; to unbiased hearing panels; to the right to confront and cross-examine all witnesses against the Plaintiff; to specific reasons in writing as to any decision or recommendation made by the hearing panel with respect to Plaintiff's privileges and/or credentials; to specific reasons in writing by the ultimate commander or decision-making authority as to why he or it took the adverse credentialing action and found Plaintiff to be "incompetent"; to a written statement of the specific facts relied upon by the credentials committees and by Defendant Casey; and to the effective assistance of counsel to actually question witnesses and present through direct and

cross examination and arguments the Plaintiff's case.

56. Hearings were held on or about July 11, 1991, and September 27, 1991, the results of which were that restrictions were placed on the privileges of Plaintiff to practice anesthesiology by the Defendants Casey and Kiley in spite of a performance assessment on June 25, 1991, which recommended full clinical privileges. These results were then communicated to the National Practitioner Data Bank even though Plaintiff had been denied constitutional due process.

57. The Plaintiff was denied all rights of procedural due process mandated by the Fifth Amendment at the so-called hearing held on or about July 11, 1991, in that Plaintiff received absolutely no notice whatsoever that such hearing was taking place, Plaintiff received no

allegations, verbally or in writing, adverse to her prior to said hearing; Plaintiff was thus unable even to personally attend said hearing, let alone have the assistance of counsel, confront and cross-examine any adverse witnesses, and meet any allegations with witnesses or documents of her own. Plaintiff was also denied all hearing rights afforded by AR 40-68.

58. The Plaintiff was not even informed of the results of the hearing which was held on or about July 11, 1991, until she received the communication which is Attachment 16 to this Complaint from the Defendant Kiley informing her that her clinical privileges were being limited indefinitely. The notification to the Plaintiff of the results of the hearing of July 11, 1991, did not contain any factual basis whatsoever for the decision to limit

or restrict her clinical privileges. Indeed, the only information given to the Plaintiff concerning such hearing was that on June 25th 1991, her performance assessment by Major Kidd recommended full clinical privileges. Therefore, this document can hardly be a basis in fact for curtailment of privileges. Plaintiff does not, however, know whether the secret July 11, 1991, hearing committee was afforded a copy of the favorable June 25, 1991, performance assessment--if it were not, this would be another due process violation.

59. Plaintiff received no proper notice of the hearing held on or about September 27, 1991, after she had already been discharged from the Army. While a notice concerning said hearing was served upon the attorney who appeared with her (but was not permitted to represent

her) at the January 8, 1991, hearing where provisional privileges were extended, such service on an attorney is constitutionally insufficient to comport with the due process clause of the Fifth Amendment to the Constitution of the United States. In any event, never was Plaintiff afforded any notice whatsoever in writing of the specific charges against her; consequently, Plaintiff was unable to present evidence or to confront and cross-examine any witnesses against her in a constitutionally meaningful way since she was ignorant of any specific factual allegations affording reasonable cause to restrict her clinical privileges as detailed in AR 40-68. Plaintiff was specifically advised that she could not be represented by counsel at any hearing affecting her credentialing.

60. The "notice" sent to a former

civilian attorney who advised Plaintiff during a hearing of January 8, 1991, failed even to comply with AR 40-68 in that it did not supply the "specific concerns that led to the need for the hearing," nor dates of any alleged factual occurrences giving rise to the subject matter of the hearing nor pertinent documents. (Emphasis added). (Plaintiff does not know whether there are pertinent documents since she received neither notice about them nor any notice of specific occurrences with which she was accused.)

61. In concluding that Plaintiff's clinical privileges should be restricted following the hearing of September 27, 1991, the hearing committee and Defendant Casey in accepting its conclusions afforded to Plaintiff no factual reasons whatsoever supplying a written factual

basis for the adverse decision reached, in violation of the due process clause to the Fifth Amendment of the Constitution of the United States.

62. Defendant Louis Sullivan, as Secretary of Health and Human Services, permitted the National Practitioner Data Bank to accept a report from Defendant Army that Plaintiff's privileges to practice had been restricted for reason of "incompetence" where Plaintiff had been denied procedural due process as mandated by the Fifth Amendment to the Constitution of the United States; and Defendant Sullivan further caused Plaintiff to be notified by the said Data Bank that he would decline to review the Army's adverse professional classification of Plaintiff, despite the foregoing due process violations.

63. The Defendants Army and Wilcox,

the latter acting on behalf of the Defendant LaNoue, failed to follow the requirements of 42 U.S.C. 11133(a)(3)(B)., by submitting a report to the National Practitioner Data Bank that failed to provide a description of the acts or omissions, or other reasons apart from acts or omissions, for the Army's adverse credentialing decision with respect to Plaintiff, and Defendant Sullivan, through said Data Bank, accepted and entered such report even though it did not comply with said statute.

VII. THIRD CLAIM FOR RELIEF

64. The Plaintiff incorporates by reference Paragraphs 1-48, 50-53 and 55-63 of this Complaint into her Third Claim for Relief, the same as if fully set forth herein, including Attachments.

65. The subject of this Third Claim for Relief is money damages against the

Defendants being sued in their individual capacities.

66. The Defendant Casey, commander of Womack Army Community Hospital, knew, or in the exercise of command diligence should have known, that Defendant Kiley as chairperson of the Credentials Hearing Committee denied to the Plaintiff the due process rights set forth above in this Complaint. Said Defendant failed and refused to take corrective action to insure that all of the Plaintiff's rights to due process guaranteed by the Fifth Amendment to the Constitution of the United States and the more limited rights given Plaintiff by AR 40-68 were afforded to her prior to his accepting the recommendations and/or decisions of the hearing committee which are the subject matter of this Complaint. Defendant Casey accepted the various decisions of the

credentials committee even though Plaintiff had been denied the due process required by the Fifth Amendment to the Constitution of the United States and even though the Defendant Casey knew that the acceptance by him of the results of the aforesaid hearings would lead to the Plaintiff's name being submitted to the National Practitioner Data Bank in such a manner that she would be injured and damaged in her professional career as a medical doctor and in the ability in the future to practice her chosen profession and earn her livelihood.

67. The Defendant Kiley, who Plaintiff alleges on information and belief, was chairman of the Credentials Committee at the July 11, 1991, and September 27, 1991, hearings, denied to the Plaintiff the due process rights set forth above in this Complaint. Said

Defendant failed and refused to take corrective action to insure all of the Plaintiff's rights to due process guaranteed by the Fifth Amendment to the Constitution of the United States were afforded to her at these hearings, or even that all of her more limited rights under AR 40-68 were accorded her. The Defendant Kiley knew, or should have known in the exercise of due diligence, that an adverse recommendation by his hearing committee predicated upon the July 11, 1991, and September 27, 1991, hearings would damage the Plaintiff in the ability to practice her chosen profession as a medical doctor and would foreseeably lead to her name being reported to the National Practitioner Data Bank in a manner that could permanently damage her reputation as a medical doctor and her ability to earn her livelihood in her chosen profession in

the future.

68. The submission of Plaintiff's name to the National Practitioner Data Bank was proximately caused by the two hearings complained of in this Complaint and the results of said hearings. Plaintiff's name now being in the National Practitioner Data Bank as a direct and proximate result of the unconstitutional acts and omissions of the Defendants hereinabove complained of being sued in their individual capacities have caused the Plaintiff great damage to her professional reputation and standing as a medical doctor, has led an official agency of the State of Virginia wherein Plaintiff is licensed to practice medicine as a doctor to institute inquiries because of her name's having been submitted to the National Practitioner Data Bank as alleged herein; and caused the Plaintiff extreme

and foreseeable embarrassment, humiliation, mental pain, suffering, and anguish, all to her great damage in the sum of at least $4,725,000.00.

69. The Defendants sued in their individual capacities recommended or found Plaintiff to be "incompetent" as a practicing anesthesiologist without basis in fact willfully intentionally, wantonly, and maliciously, or in reckless, wanton, and heedless indifference to the effect such finding or recommendation would have on Plaintiff and on her professional good name standing, reputation, and her ability to earn her livelihood and pursue her chosen profession in the future.

70. The Defendants being sued in their individual capacities recommended or found that Plaintiff's clinical privileges as a practicing anesthesiologist should be restricted or limited without basis in

fact willfully, intentionally, wantonly, and maliciously, or in reckless, wanton, and heedless indifference to the effect such finding or recommendation would have on Plaintiff and on her professional good name, standing, reputation, and her ability to earn her livelihood and pursue her chosen profession in the future.

71. The Defendants sued in their individual capacities recommended or found Plaintiff to be "incompetent" as a practicing anesthesiologist and also recommended or found Plaintiff's clinical privileges should be restricted or limited, without first according the Plaintiff her full rights to the minimum procedural due process requirements of the Fifth Amendment to the Constitution of the United States, or even without according to the Plaintiff her full procedural rights guaranteed by the Army's

regulations, willfully, intentionally, wantonly, and maliciously, or in reckless, wanton, and heedless indifference to such rights afforded to the Plaintiff by the Fifth Amendment to the Constitution of the United States and by AR 40-68 although the importance of such protections to Plaintiff's liberty and property interests were manifest given the effect that a finding of "incompetency" or a restriction or limitation on clinical privileges would have on Plaintiff and on her professional good name, standing, reputation, and her ability to earn her livelihood and pursue her chosen profession in the future.

72. As a result of the aforesaid willful, intentional, wanton, malicious, reckless, heedless, or indifferent acts and omissions of the Defendants named in their individual capacities, Plaintiff is entitled to have the issue of punitive

damages submitted to the trier of fact, and given the importance of the property, liberty, and constitutional interests involved hereint should have and recover punitive damages of each Defendant named in his individual capacity of at least $5,000,000.00.

## VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court grant the following relief:

A. Issue a preliminary injunction enjoining the Defendantst their agents, servants, and employees, and/or anyone acting in concert with them and/or in their behalf, from disseminating any information that refers to the Plaintiff or her professional ability as incompetent, or disseminating any information to the effect that Plaintiff's clinical privileges were restricted or

limited by the Army or by the Defendants;

B. Issue a preliminary injunction or an order in the nature of mandamus directing the Defendants, their successors, agents, servants, and employees, and/or anyone acting in concert with them and/or in their behalf to submit a Report to the National Practitioner Data Bank to void the Adverse Action Report signed on or about March 23, 1992, and to effect this by checking the "Void Previous Report" box in numbered item 2 of Section A; and directing the Defendant Sullivan to honor such Report voiding the prior action by expunging the professionally damaging information from the Data Bank's records during the period such preliminary injunction or interlocutory order is in effect;

C. After a trial on the merits, issue a declaratory judgment that the publication by the Defendants to the

National Practitioner Data Bank and the entry to such effect in the records of said Data Bank that the Plaintiff had been restricted for "incompetence" was done in violation of the Plaintiff's substantive and procedural due process rights under the Fifth Amendment to the Constitution of the United States; and in violation of 42 U.S.C. 11133(a)(3)(B),

D. After a trial on the merits, issue a declaratory judgment that the publication by the Defendants to the National Practitioner Data Bank and the entry to such effect in the records of said Data Bank that Plaintiff's clinical privileges were restricted by Defendants was done in violation of the Plaintiff's substantive and procedural due process rights under the Fifth Amendment to the U.S. Constitution; and in violation of 42 U.S.C. 11133(a)(3)(B);

E. After a trial on the merits, issue a permanent injunction, permanently enjoining the Defendants, their successors, agents, servants, and employees, and/or anyone acting in concert with them and/or in their behalf, from disseminating any information that refers to the Plaintiff or her professional ability as incompetent, or disseminating any information to the effect that Plaintiff's clinical privileges were restricted or limited by the Army or by the Defendants;

F. After a trial on the merits, issue a permanent injunction or an order in the nature of mandamus directing the Defendants, their successors, agents, servants, and employees, and/or anyone acting in,concert with them and/or in their behalf to submit a Report to the National Practitioner Data Bank to void

the Adverse Action Report signed on or about March 23, 1992, and to effect this by checking the "Void Previous Report" box in numbered item 2 of Section A, and to leave the voiding permanent; and directing the Defendant Sullivan and his successors to honor such a Report and permanently expunge the professionally damaging information with respect to Plaintiff;

G. Award to Plaintiff compensatory damages against the Defendants Kiley, Casey, and Unknown Named Members of the U.S. Army, jointly and severally, in the sum of at least $4,725,000.00;

H. Award Plaintiff punitive damages against Defendants Kiley, Casey, and Unknown Named Members of the U.S. Army, in the sum of at least $5,000,000.00 each;

I. Award the Plaintiff the costs of this action, including reasonable attorneys' fees; and

J. Afford the Plaintiff such other and further relief as this Court deems just and proper.

THE PLAINTIFF HEREON ENDORSES HER DEMAND FOR TRIAL BY JURY OF ALL ISSUES PERMITTED BY LAW TO BE TRIED BY JURY.

This 31st day of August, 1992.

THOMAS F. LOFLIN III
Attorney for Plaintiff
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919/783-5657

NORTH CAROLINA

DURHAM COUNTY

VERIFICATION

SHIRLEY M. RANDALL, M.D., being first duly sworn, deposes and says: I am the Plaintiff herein, that I have read the foregoing complaint and that the same is true of my own knowledge save and except for those matters and things alleged upon information and belief, and as to those things I verily believe them to be true.

"S/_____

SHIRLEY M. RANDALL, MD

Sworn to and subscribed before me
this 26th day of August, 1992.

"s/_____)

My Commission Expires October 2, 1994.

# APPENDIX F

## LETTER TO DR. BRIAN CONDON FROM MICHAEL G. KIDD

## NOVEMBER 2, 1989

HSXC-SU 2 November 1989

SUBJECT: Assignment at Fort Bragg

COL Brian Condon
Anesthesiology Consultant
to the Surgeon General
Walter Reed Army Medical Center
Washington, D.C. 20307-5001

Dear Sir:

This letter is a follow-up to our phone conversation of 2 November 1989 concerning issues at Womack Army Community Hospital, you have confirmed that MAJ Paul E. Casinelli, will be leaving for the 97th General Hospital in January 1990, as well as the expected loss of MAJ John H. Gillespie to a fellowship at Brooke Army Medical Center in June 1990. The plans for replacement of Dr. Casinelli and Dr. Gillespie will include the assignment of MAJ Shirley Randall to Womack Army Hospital in January 1990, as well as at least one other anesthesiologist in the summer of

1990. The summer replacement will most likely be a graduating resident. A fourth anesthesiologist could be assigned here if your staffing requirements allow.

There is much concern over the assignment of Dr. Randall to Womack due to the rumor of her lack in interpersonal skills as well as her decline of clinical skills. You have voiced your opinion of her clinical abilities by stating that she is at a level of a first year resident clinically. This is due to the fact that she was trained at a civilian residency program which required only two years of clinical anesthesia and her prior assignments. Her first assignment was to Heidelberg, Germany as the only anesthesiologist and then to Fort Polk, Louisiana, where she was again the only anesthesiologist. She was placed into an administrative position in both places

where she was Chief of the Anesthesia and Operative Service, and her clinical abilities declined.

Your concern with her acceptance of not being Chief at Womack has been handled by the Womack Commander. Dr. DeWitt has announced that I will be Chief since I am the Diplomate of the American Board of Anesthesiology. MAJ Randall will be placed in a situation where she can concentrate on improving her clinical skills.

I do however, want to clarify our phone conversation on her status. As Consultant to the Surgeon General in Anesthesiology, you have advised me to bring her in to retrain Dr. Randall in Anesthesiology. That she should not be viewed as a fully functioning staff anesthesiologist at Womack but rather in a "Retraining Status". You also

recommended that I grant her limited provisional privileges for a period of six months. These privileges should mandate that she not perform any anesthesia unsupervised and that she not supervise CRNA's for the above period of time. These limited privileges will require that she not be on the call schedule. Dr. Randall's progress should be discussed in a monthly meeting with her and an MFR be generated to document the meeting. Your recommendation also included arranging CME for Dr. Randall by a review course and possibly attending lectures at Duke University. A letter of input to her rater will also be placed so that her clinical abilities can be commented on by COL Donohue.

The second purpose of this letter is to ask for your help and advice in working with Dr. Randall. I understand

that Dr. Randall's OER's and credentials file do not reflect her decline in clinical abilities to warrant her being placed in a retraining status. In this case, how can I grant her anything less that provisional full privileges? this would mean that she would be treated as a staff anesthesiologist without restriction. I ask for a definition of her clinical abilities and instructions on how she should be retrained upon her arrival. I must have this written direction since the command has found nothing in her files to even question her abilities and will grant full privileges without your direction.

Retraining of an individual will be very time intensive at a hospital which performs an average of 480 surgical cases a month and 560 episodes of surgery. This will be a difficult task for Dr.

Gillespie and myself. Noting this fact, that in four months, after Dr. Randall's arrival, D. Gillespie will be outprocessing and moving, I feel that one person cannot run the busy operative schedule at Womack and continue to improve her skills. For this reason, I ask that there not be a period of time when only Dr. Randall and myself are left at Fort Bragg. I also will note, with the expansion of the OR capabilities of Womack by opening an ambulatory surgical unit, that four anesthesiologists, to include Dr. Randall, will be the minimum staff requirement.

I thank you for your time and effort in our behalf here at Womack Army Community Hospital. I await your reply about the issues discussed in this letter. If you have any further information concerning Dr. Randall,

please forward that to myself or the Commander, so that I will be in a position to better understand Dr. Randall's needs upon her arrival at Fort Bragg.

MICHAEL G. KIDD, M.D.
CPT(P), MC
Asst Chief, Anesthesia/operative Svc

cc: C, Dept of Surg
DCCS
Cdr, WACH

# APPENDIX G

## LETTER FROM BRIAN CONDON TO MICHAEL KIDD

## NOVEMBER 21, 1989

HSHL-SCC 21 November 1989

CPT(P) Michael Kidd, MD
Assistant Chief
Anesthesia Service
Womack Army Community Hospital
Fort Bragg, North Carolina 28307-5000

Dr. Randall (Shirley Mason Randall, MD, MAJ, MC) completed an internship in June 1982. This was done in a civilian hospital. Her residency, at the Medical College of virginia, was of two years duration. She has been assigned to two army community hospitals, for a total of five years, in which she was the only physician in anesthesia at that assignment for each of the five years. She has not become board certified in all this time.

Dr. Randall satisfied the minimal requirements for residency training five years ago. She has been assigned where we should expect her to develop professionally with considerable

difficulty. e.g. small hospital; no role model or peer group stimulation. Anesthesia has increased in sophistication to a great extent over the past five years. It is my opinion, that this is sufficient evidence to create enough doubt about the clinical competence of this physician, in the specialty of Anesthesiology, to recommend a careful clinical evaluation, by the Chief of Anesthesia, that a more prolonged restriction under supervision may be wise.

Let me make the request that the board certified Anesthesiologists, at Womack Army Community Hospital, help Dr. Randall toward professional development, sophistication of practice and board certification.

BRIAN F. CONDON, MD
COL, MC
C, Critical Care Service

# APPENDIX H

## NOTICE OF CREDENTIALS HEARING

## DECEMBER 10, 1990

HSXC-CS (640-10e) 10 December 1990

MEMORANDUM FOR: Shirley M. Randall,
MAJ, MC, USA MEDDAC,
Fort Bragg, NC
28307-5000

SUBJECT: Notice of Credentials Hearing

1. A credentials hearing committee will conduct a hearing concerning allegations that may adversely affect your clinical privileges.

2. The allegation to be reviewed alleges an inability to practice as an independent anesthesiologist. Records concerning these allegations are available to you at the Quality Assurance office.

3. The credentials committee will hold the hearing on 19 December 1990 at 1630 hours in the Emerson Conference Room. You have the right to be present, to present evidence and call witnesses in your behalf, to cross examine witnesses

called by the committee, to consult legal counsel, and to be advised by legal counsel at the hearing. It will be your responsibility to arrange for any witnesses you desire. Military counsel will not be made available to advise you at the hearing. You may retain a civilian attorney at your own expense.

a. Failure to appear at the hearing will constitute a waiver of the rights listed here and the right to appeal.

b. The time and place of the hearing may be changed by the chairperson of the hearing committee upon your written request before the indicated suspense date if based on good cause.

c. The committee will call the following witnesses: None.

MARK E. BLAEDEL

COL, MC

Chairman, Credentials Committee

SU (HSXC-CS/10 Dec 90) (640-10e) 1st End MAJ Randall/2-6579
SUBJECT: Receipt of a Memorandum of Notification of a Credentials Hearing

Shirley M. Randall, MAJ, MC, USA MEDDAC, Fort Bragg, NC 28307-5000

Commander, USA MEDDAC, Fort Bragg, NC 28307-5000, ATTN: Chairman, Credentials Committee

I hereby acknowledge receipt of the subject Memorandum of Notification of a Credentials hearing. The memorandum is dated 10 December 1990 and I received it on 10 December 1990.

SHIRLEY M. RANDALL

MAJ, MC

# APPENDIX I

## NOTICE OF CREDENTIALS HEARING

## AUGUST 1, 1991

HSXC-CS (640-10e) 1 Aug 1991

MEMORANDUM FOR: Shirley M. Randall,
MAJ, MC, USA MEDDAC,
Fort Bragg, NC
28307-5000

SUBJECT: Notice of Credentials Hearing

1. A credentials hearing committee will conduct a hearing concerning allegations that may adversely affect your clinical privileges.

2. The allegation to be reviewed alleges an inability to practice as an independent anesthesiologist. Records concerning these allegations are available to you at the Quality Assurance office.

3. The credentials committee will hold the hearing on 13 August 1991 at 0830 hours in the Emerson Conference Room. You have the right to be present, to present evidence and call witnesses in your behalf, to cross examine witnesses

called by the committee, to consult legal counsel, and to be advised by legal counsel at the hearing, however you may not be represented by counsel. It will be you responsibility to arrange for any witnesses you desire. Military counsel will not be made available to advise you at the hearing. You may retain a civilian attorney at your own expense.

a. Failure to appear at the hearing will constitute a waiver of both the rights listed here and the right to appeal.

b. The time and place of the hearing may be changed by the chairperson of the hearing committee upon your written request before the indicated suspense date if based on good cause.

c. The committee will call the following witnesses:

COL Hugh J. Donohue, Jr., MC
MAJ Michael G. Kidd, MC
CPT Lea D. Stern, MC

KEVIN C. KILEY, MD
COL, MC
Chairman, Credentials Committee